No. 05-1126
Title: Bell Atlantic Corporation, et al., Petitioners
v.
William Twombly, et al.
Docketed: March 7, 2006
Lower Ct: United States Court of Appeals for the Second Circuit
Case Nos.: (03-9213)
Decision Date: October 3, 2005
Rehearing Denied: January 3, 2006
Questions Presented

Date	Proceedings and Orders
Mar 6 2006	Petition for a writ of certiorari filed. (Response due April 6, 2006)
Apr 5 2006	Brief amicus curiae of Pharmaceutical Research and Manufacturers of America filed.
Apr 5 2006	Waiver of right of respondents William Twombly, et al. to respond filed.
Apr 6 2006	Brief amicus curiae of American Petroleum Institute filed.
Apr 6 2006	Brief amici curiae of Chamber of Commerce of the United States, et al. filed.
Apr 6 2006	Brief amici curiae of Mastercard International Inc. and Visa Inc. filed.
Apr 6 2006	Brief amicus curiae of Washington Legal Foundation filed.
Apr 6 2006	Brief amici curiae of Economists William Baumol, et al. filed.
Apr 6 2006	Brief amici curiae of E.I. du Pont de Nemours and Company, and The National Association of Manufacturers filed.
Apr 6 2006	Brief amicus curiae of Louisiana-Pacific Corp. filed.
Apr 12 2006	DISTRIBUTED for Conference of April 28, 2006.
Apr 24 2006	Response Requested . (Due May 24, 2006)
May 24 2006	Brief of respondents William Twombly, et al. in opposition filed.
May 30 2006	DISTRIBUTED for Conference of June 15, 2006.
May 30 2006	Reply of petitioners Bell Atlantic Corporation, et al. filed. (Distributed)
Jun 19 2006	DISTRIBUTED for Conference of June 22, 2006.
Jun 26 2006	Petition GRANTED.
Jul 10 2006	Extensions of time to file the briefs on the merits. The joint appendix and petitioners' brief on the merits is due on or before August 25, 2006. The respondents' brief on the merits is due on or before October 13, 2006.
Aug 18 2006	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioners.
Aug 18 2006	Consent to the filing of amicus briefs in suport of either party received from counsel for the respondents.

Aug 25 2006	Joint appendix filed.
Aug 25 2006	Brief of petitioners Bell Atlantic Corporation, et al. filed.
Aug 25 2006	Brief amici curiae of Mastercard International Inc. and Visa Inc. filed.
Aug 25 2006	Brief amici curiae of Chamber of Commerce of the United States, et al. filed.
Aug 25 2006	Brief amici curiae of Legal Scholars filed.
Aug 25 2006	Brief amicus curiae of American Petroleum Institute filed.
Aug 25 2006	Brief amicus curiae of United States filed.
Aug 25 2006	Brief amici curiae of Commonwealth of Virginia and 15 Other States filed.
Aug 25 2006	Brief amicus curiae of Americn Bar Association in support of neither party filed.
Aug 25 2006	Brief amici curiae of Economists William Baumol, et al. filed.
Sep 29 2006	SET FOR ARGUMENT ON Monday, November 27, 2006.
Oct 4 2006	CIRCULATED.
Oct 11 2006	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Oct 13 2006	Brief of respondents William Twombly, et al. filed. (Distributed)
Oct 13 2006	Brief amici curiae of Legal Scholars Debra Lyn Bassett, et al. filed. (Distributed)
Oct 13 2006	Brief amicus curiae of American Antitrust Institute filed. (Distributed)
Oct 27 2006	Motion for divided argument filed by respondents William Twombly, et al.
Nov 6 2006	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Nov 6 2006	Motion for divided argument filed by respondent DENIED.
Nov 8 2006	Record received from U.S.C.A. 2nd Circuit. (1 envelope)
Nov 9 2006	Reply of petitioners Bell Atlantic Corporation, et al. filed. (Distributed)
Nov 27 2006	Argued. For petitioners: Michael Kellogg, Washington, D.C.; and Thomas O. Barnett, Assistant Attorney General, Department of Justice, Washngton, D.C. (For the United States, as amicus curiae.) For respondents: J. Douglas Richards, New York, N.Y.
Nov 29 2006	Record received from U.S.D.C. for the Southern District of New York. (1 box)

(1) Supreme Court, U.S.
FILED
No. 05-1126 MAR 6 - 2006
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BELL ATLANTIC CORPORATION, *ET AL.*,
Petitioners,
v.
WILLIAM TWOMBLY, *ET AL.*, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

STEPHEN M. SHAPIRO
KENNETH S. GELLER
RICHARD J. FAVRETTO
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000
Counsel for BellSouth Corporation

SETH P. WAXMAN
WILLIAM J. KOLASKY
WILMER CUTLER PICKERING HALE AND DORR LLP
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6357
Counsel for Qwest Communications International Inc.

March 6, 2006

MICHAEL K. KELLOGG
Counsel of Record
MARK C. HANSEN
SEAN A. LEV
AARON M. PANNER
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
Counsel for AT&T Inc. (formerly SBC Communications Inc.)

RICHARD G. TARANTO
FARR & TARANTO
1220 19th Street, N.W., Suite 800
Washington, D.C. 20036
(202) 775-0184
Counsel for Verizon Communications Inc.

(additional counsel listed on inside cover)

LAURA J. COLEMAN
J. HENRY WALKER
MARC W.F. GALONSKY
ASHLEY WATSON
BELLSOUTH CORPORATION
1155 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 249-2720
Counsel for BellSouth Corporation

JOHN THORNE
PAUL J. LARKIN, JR.
DAVID E. WHEELER
ROBERT J. ZASTROW
VERIZON COMMUNICATIONS INC.
1515 North Courthouse Road
Arlington, Virginia 22201
(703) 351-3900

DAN K. WEBB
CHARLES B. MOLSTER III
WINSTON & STRAWN LLP
35 W. Wacker Drive
Chicago, Illinois 60601
(312) 558-5856
Counsel for Verizon Communications Inc. (successor-in-interest to Bell Atlantic Corporation)

CYNTHIA P. DELANEY
QWEST COMMUNICATIONS INTERNATIONAL INC.
1801 California Street
Denver, Colorado 80202
(303) 383-6790

TIMOTHY BEYER
BROWNSTEIN HYATT & FARBER, P.C.
410 17th Street, 22nd Floor
Denver, Colorado 80202
(303) 223-1116
Counsel for Qwest Communications International Inc.

JAVIER AGUILAR
WILLIAM M. SCHUR
AT&T SERVICES, INC.
175 E. Houston Street, 2d Floor
San Antonio, Texas 78205
(210) 351-3409
Counsel for AT&T Inc. (formerly SBC Communications Inc.)

QUESTION PRESENTED

Whether a complaint states a claim under Section 1 of the Sherman Act, 15 U.S.C. § 1, if it alleges that the defendants engaged in parallel conduct and adds a bald assertion that the defendants were participants in a "conspiracy," without any allegations that, if later proved true, would establish the existence of a conspiracy under the applicable legal standard.

LIST OF PARTIES TO THE PROCEEDINGS

Petitioners Bell Atlantic Corporation, BellSouth Corporation, Qwest Communications International Inc., SBC Communications Inc. (now known as AT&T Inc.), and Verizon Communications Inc. (successor-in-interest to Bell Atlantic Corporation) were defendants in the district court and appellees in the court of appeals.

Respondents William Twombly and Lawrence Marcus, both individually and on behalf of all others similarly situated, were plaintiffs in the district court and appellants in the court of appeals.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, petitioners Bell Atlantic Corporation, BellSouth Corporation, Qwest Communications International Inc., SBC Communications Inc. (now known as AT&T Inc.), and Verizon Communications Inc. (successor-in-interest to Bell Atlantic Corporation) state the following:

Bell Atlantic Corporation. On June 30, 2000, GTE Corporation and Bell Atlantic Corporation merged, and Bell Atlantic Corporation subsequently changed its name to Verizon Communications Inc., its successor-in-interest. Verizon Communications Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

BellSouth Corporation. BellSouth has no parent company, and no publicly held company owns 10% or more of its stock.

Qwest Communications International Inc. Qwest Communications International Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

SBC Communications Inc. On November 18, 2005, SBC Communications Inc. ("SBC") merged with AT&T Corp. That same day, SBC changed its name to AT&T Inc. AT&T Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

Verizon Communications Inc. Verizon Communications Inc. is the successor-in-interest to Bell Atlantic Corporation. Verizon Communications Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES TO THE PROCEEDINGS ii

CORPORATE DISCLOSURE STATEMENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE 3

1. The Complaint 3

2. The District Court's Decision 7

3. The Court of Appeals' Opinion 9

REASONS FOR GRANTING THE PETITION 11

I. THE STANDARD ADOPTED BY THE COURT OF APPEALS CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND OTHER CIRCUITS 11

A. Because Unilateral But Parallel Conduct Is Lawful, a Complaint Alleging a Violation of Section 1 Based on Parallel Conduct Must Allege Additional Facts Supporting an Inference of Conspiracy 11

B. The Decision Below Conflicts with Decisions of Other Courts of Appeals 19

II. APPLICATION OF THE CORRECT LEGAL STANDARD REQUIRES DISMISSAL OF THE COMPLAINT IN THIS CASE 21

III. THE CASE PRESENTS A RECURRING ISSUE OF SUBSTANTIAL IMPORTANCE 26

CONCLUSION 29

APPENDIX

TABLE OF AUTHORITIES

Page

CASES

Andrx Pharms., Inc. v. Biovail Corp., 256 F.3d 799 (D.C. Cir. 2001) 26

Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983) 17, 18, 28, 29

AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999) 3

Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, Inc., 203 F.3d 1028 (8th Cir. 2000) 13

Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982) 29

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993) 12

Cayman Exploration Corp. v. United Gas Pipe Line Co., 873 F.2d 1357 (10th Cir. 1989) 19, 20

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 14

Citric Acid Litig., In re, 191 F.3d 1090 (9th Cir. 1999) 13

City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978) 29

Conley v. Gibson, 355 U.S. 41 (1957) 15

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) 11

DM Research, Inc. v. College of Am. Pathologists, 170 F.3d 53 (1st Cir. 1999) 18, 20, 26

Dual-Deck Video Cassette Recorder Antitrust Litig., In re, 11 F.3d 1460 (9th Cir. 1993) 26

Dura Pharms., Inc. v. Broudo, 125 S. Ct. 1627 (2005) 15, 16, 17, 27, 28

Estate Constr. Co. v. Miller & Smith Holding Co., 14 F.3d 213 (4th Cir. 1994) 18

Euromodas, Inc. v. Zanella, Ltd., 368 F.3d 11 (1st Cir. 2004) 23

Flat Glass Antitrust Litig., In re, 385 F.3d 350 (3d Cir. 2004), *cert. denied*, 125 S. Ct. 1699 (2005) 13

Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993) 29

Hoover v. Ronwin, 466 U.S. 558 (1984) 29

Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993) 14

Lombard's, Inc. v. Prince Mfg., Inc., 753 F.2d 974 (11th Cir. 1985) 18

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 12, 13, 14, 20, 21

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 15

Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984) 11, 12, 13, 14, 21

Nagler v. Admiral Corp., 248 F.2d 319 (2d Cir. 1957) 13

NHL Players Ass'n v. Plymouth Whalers Hockey Club, 419 F.3d 462 (6th Cir. 2005) 20, 21

NYNEX Corp. v. Discon, Inc., 525 U.S. 128 (1998) 3, 29

Out Front Productions, Inc. v. Magid, 748 F.2d 166 (3d Cir. 1984) 26

Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 27, 28

St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531 (1978) 29

Summit Health, Ltd. v. Pinhas, 500 U.S. 322 (1991) 29

Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002) 15, 16

Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537 (1954) 12, 13

United States v. AT&T Co., 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) 3

Verizon Communications Inc. v. FCC, 535 U.S. 467 (2002) 22

Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) ... 3, 4, 22, 24, 25, 29

Viazis v. American Ass'n of Orthodontists, 314 F.3d 758 (5th Cir. 2002) 13

Williamson Oil Co. v. Philip Morris USA, 346 F.3d 1287 (11th Cir. 2003) 13

ADMINISTRATIVE DECISIONS

Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 (2005), *petitions for review pending, Covad Communications Co. v. FCC*, Nos. 05-1095, *et al.* (D.C. Cir., to be argued March 21, 2006) 24

STATUTES AND RULES

Civil Rights Act of 1964, Pub. L. No. 88-352, Tit. VII, 78 Stat. 241, 253 16

Sherman Act, 15 U.S.C. §§ 1 *et seq.*:

§ 1, 15 U.S.C. § 1 ..... 1, 5, 9, 11, 17, 18, 19, 20, 21

§ 2, 15 U.S.C. § 2 ..... 4, 5

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 3

47 U.S.C. § 271 4

28 U.S.C. § 1254(1) 1

Fed. R. Civ. P.:

Rule 8 ..... 11, 14

Rule 8(a) 2, 7, 15

Rule 12(b) 14

LEGISLATIVE MATERIALS

Antitrust Enforcement Agencies – The Antitrust Division of the Department of Justice and the Bureau of Competition of the Federal Trade Commission: Hearing Before the Task Force on Antitrust of the House Comm. on the Judiciary, 108th Cong., 1st Sess. (July 24, 2003) 25

OTHER MATERIALS

6 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* (2d ed. 2002) 12, 24, 25

Brief for the United States as Amicus Curiae, *Dura Pharms., Inc. v. Broudo*, No. 03-932 (U.S. filed May 28, 2004) 28, 29

Consol. Am. Class Action Compl., *In re SBC Communications, Inc. Antitrust Litig.*, No. 3:02CV1617 (DJS) (D. Conn. filed Feb. 19, 2003) 4

John T. Delacourt, *Protecting Competition by Narrowing Noerr: A Reply*, 18 Antitrust 77 (2003) 27

Henry J. Friendly, *Federal Jurisdiction* (1973) 28

6 James Wm. Moore, *et al.*, *Moore's Federal Practice* (3d ed. 2003) 27

Robert L. Stern, *et al.*, *Supreme Court Practice* (8th ed. 2002) 29

Jon Van, *Ameritech Customers Off Limits: Notabaert*, Chi. Trib., Oct. 31, 2002, at Business p.1 24

Jon Van, *Lawmakers Seek Probe of Bells: Do Firms Agree Not To Compete?*, Chi. Trib., Dec. 19, 2002, at Business p.2 24

5B Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* (3d ed. 2004) 14

Bell Atlantic Corporation, BellSouth Corporation, Qwest Communications International Inc., SBC Communications Inc. (now known as AT&T Inc.), and Verizon Communications Inc. (successor-in-interest to Bell Atlantic Corporation) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a-34a) is reported at 425 F.3d 99. The district court's opinion (Pet. App. 35a-58a) is reported at 313 F. Supp. 2d 174.

JURISDICTION

The court of appeals entered its judgment on October 3, 2005. A timely petition for rehearing was denied on January 3, 2006. Pet. App. 59a-60a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, is set forth at Pet. App. 61a.

PRELIMINARY STATEMENT

The Second Circuit has decided an important and recurring question regarding the standards for pleading a claim under Section 1 of the Sherman Act. The court held that a complaint can survive a motion to dismiss simply by alleging otherwise innocuous parallel conduct – conduct that would not support an inference of conspiracy under this Court's precedents – coupled with a bald assertion (but no supporting facts indicating) that such conduct is the result of a "conspiracy." That ruling conflicts with the decisions of other circuits, is inconsistent with this Court's precedent, and invites – by the Second Circuit's own admission – unmeritorious suits intended to extract settlement payments from defendants whose only alternative is to bear the "colossal expense of undergoing discovery." Pet. App. 30a.

Plaintiffs below are consumers, representatives of a purported class, who allege that incumbent telephone companies, acting in parallel: (1) resisted new entrants' efforts to enter their respective markets and (2) failed to compete in each others' territories as new entrants. Absent *agreement* by the defendant companies, the allegations fail to state a claim under Section 1 of the Sherman Act. Plaintiffs therefore added an allegation that the defendants conspired – though they do not say when (sometime in the last decade); they do not say where; they do not say who (the four defendants have nine major corporate predecessors and hundreds of thousands of employees); and they do not even say why (because the alleged conduct is perfectly explicable on grounds of self-interest, without any need for collusion).

The United States District Court for the Southern District of New York (Lynch, J.) dismissed, holding that the complaint could not proceed unless the behavior alleged, if ultimately proved, would support an inference of conspiracy under the legal standards established by this Court. Facts meeting the Sherman Act standards for inferring conspiracy are needed both to "show[] that the pleader is entitled to relief," Fed. R. Civ. P. 8(a); *see* Pet. App. 44a, and to give the defendants "some idea of how and why the defendants are alleged to have conspired," *id.* at 45a. Judge Lynch concluded that the parallel conduct alleged in this case failed to support any inference of conspiracy: all businesses are expected, acting on their own, to resist rivals' efforts to take their customers, and there is nothing remotely suspicious – *i.e.*, suggestive of concerted rather than independent action – about a firm's decision not to enter a new line of business, particularly one attended by the risks described in the complaint.

Because the Second Circuit "disagree[d] with the standard that the district court applied," *id.* at 3a, it reversed. It held, instead, that "allegations of parallel anticompetitive conduct" always suffice to state a claim of conspiracy under Section 1 unless "there is *no set of facts* that would permit a plaintiff to demonstrate that the particular parallelism asserted was the

product of collusion rather than coincidence." *Id.* at 25a (emphasis added). It acknowledged that the "overall result" of its standard – which invites unfounded claims by dispensing with any requirement that a complaint plead facts that would suffice legally to show that collusion lay behind the parallel conduct – would place "a burden on the courts and [have] a deleterious effect on the manner in which and efficiency with which business is conducted." *Id.* at 30a. But it stated that only "Congress or the Supreme Court" could ameliorate the result. *Id.*

The Court should accept the Second Circuit's invitation. It should do so not only to resolve a split in the circuits, but also to make clear that, to survive a motion to dismiss, a Section 1 complaint must state a claim under substantive antitrust standards. *See Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (reversing Second Circuit decision on motion to dismiss antitrust claim); *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998) (same). Unless corrected, the decision will lead to mushrooming claims, imposing incalculable costs and distorting legitimate, unilateral business judgments.

STATEMENT OF THE CASE

1. The Complaint

In 1982, the AT&T divestiture decree created seven Regional Bell Operating Companies ("Bell companies") and assigned each of them to a different portion of the country. *See United States v. AT&T Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). These seven Bell companies – predecessors of the four defendants – provided local telephone service pursuant to state-authorized exclusive franchise arrangements but were barred from offering long-distance service. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 413-14 (1999) (Breyer, J., concurring in part and dissenting in part). The Telecommunications Act of 1996 (the "1996 Act") eliminated exclusive franchises and authorized new entry in local

telephone service markets. To jump-start entry without the need for duplication of all local network facilities, the 1996 Act required the incumbent local telephone companies to "unbundle" – that is, to share with new entrants at low, cost-based rates – certain elements of their local networks. *See Trinko*, 540 U.S. at 405-06. In return for opening their local markets to competition, the Bell companies were promised the opportunity – once they had fully complied with their market-opening obligations – to enter the long-distance business on a state-by-state basis. *See generally* 47 U.S.C. § 271. Between 1999 and 2003, after spending billions on regulatory compliance efforts, and having their market-opening efforts exhaustively scrutinized by the Department of Justice and by federal and state regulatory authorities, all the Bell companies eventually earned approval to offer long-distance service in their respective states.

In 2002, the Second Circuit ruled in *Trinko v. Verizon* that an alleged failure to comply with the network-sharing duties of the 1996 Act could be "exclusionary conduct" for purposes of Sherman Act Section 2. In the wake of that ruling, William Twombly sued SBC in the District of Connecticut, on behalf of a purported class, under Section 2. He claimed that 12 categories of conduct, all related to insufficient sharing by SBC, constituted anticompetitive conduct designed "to restrain, stifle and delay any meaningful competition for local telephone and/or high-speed internet services." Consol. Am. Class Action Compl. ¶ 30, *In re SBC Communications, Inc. Antitrust Litig.*, No. 3:02CV1617 (DJS) (D. Conn. filed Feb. 19, 2003). After this Court reversed the Second Circuit in *Trinko*, holding that claims of insufficient sharing are not actionable under Section 2, Twombly abandoned his complaint.

But Twombly's effort to add "new layer[s] of interminable litig ation" to implementation of the 1996 Act, *Trinko*, 540 U.S. at 414, was not limited to the Section 2 case he had brought in Connecticut. Joined by a second purported class representative, Twombly brought this separate class action complaint in the Southern District of New York, this time

under Section 1. The complaint alleges that "Defendants . . . have engaged and continue to engage in unanimity of action by committing one or more of the following wrongful acts in furtherance of a common anticompetitive objective to prevent competition . . . in their respective local telephone and/or high speed internet service markets"; the complaint then lists precisely the same 12 categories of conduct that provided the basis for Twombly's earlier complaint under Section 2. Am. Compl. ¶ 47. The complaint adds one more allegation: that defendants "have refrained from engaging in meaningful head-to-head competition in each other's markets." *Id.* ¶ 39.

Although plaintiffs allege that "Defendants and their co-conspirators engaged in a contract, combination or conspiracy," *id.* ¶ 64, the complaint makes clear that the sole basis for the allegation is the observed marketplace conduct of the defendants (and one newspaper quote attributed to one of the defendant's executives). Plaintiffs allege no facts directly indicating any agreement among the defendants. The complaint fails to allege when the agreement was reached, "the exact dates being unknown to Plaintiffs." *Id.* The complaint fails to identify which of the corporate predecessors of the four defendants participated in the conspiracy. Nor does it identify any of the "other persons, firms, corporations and associations" that also allegedly participated in the conspiracy. *Id.* ¶ 16. And, although the complaint alleges that defendants "communicate amongst themselves through a myriad of organizations," *id.* ¶ 46, it fails to identify a single occasion on which any relevant agreement was reached, the mechanism for enforcement of any such agreement, or any individual parties to any such understanding.

Instead, plaintiffs "allege *upon information and belief*," "[i]n the absence of any meaningful competition between the [defendants] in one another's markets, and in light of the parallel course of conduct that each engaged in to prevent competition from [new entrants]," that "Defendants have entered into a contract, combination or conspiracy." *Id.* ¶ 51 (emphasis added). Plaintiffs also include two types of allegations

intended to bolster their conjecture. First, plaintiffs argue that each defendant's failure to compete even where their respective territories abut or in some cases surround those of the other defendants "would be anomalous in the absence of an agreement." *Id.* ¶ 40. The complaint alleges that, in competing for business in such nearby areas, each defendant would have "substantial competitive advantages," *id.* ¶ 41, though the complaint says nothing about how any defendant could overcome the obstacles that incumbents have supposedly placed in the way of all new entrants. Moreover, plaintiffs allege, an executive of one of the defendants had commented that competing as a new entrant, or "CLEC,"[1] in the territory of one of the other defendants "might be a good way to turn a quick dollar but that doesn't make it right," *id.* ¶ 42, ignoring the same executive's statement, in the same article, that such entry is not a "sustainable economic model," *see infra* note 6.

Second, plaintiffs allege that defendants had both the ability and the incentive to conspire. The "structure of the market . . . is such as to make a market allocation agreement feasible" in that "[e]laborate communications . . . would not have been necessary in order to enable Defendants to agree to allocate territories" and "[i]f one of the Defendants had broken ranks and commenced competition in another's territory the others would quickly have discovered that fact." *Id.* ¶¶ 48, 49. Also, "[h]ad any one of the Defendants not sought to prevent CLECs . . . from competing effectively . . . the resulting greater competitive inroads into that Defendant's territory would have revealed the degree to which competitive entry by CLECs would have been successful in the other territories in the absence of such conduct" and "would have enhanced the likelihood that such a CLEC might present a

---

[1] New entrants to local telephone markets, in the wake of the 1996 Act, are commonly known as "competitive local exchange carriers" or "CLECs." The incumbent local exchange carriers are known as "ILECs."

competitive threat in other Defendants' territories as well." *Id.* ¶ 50.

2. The District Court's Decision

The district court granted defendants' motion to dismiss for failure to state a claim. Judge Lynch began by noting that, "absent an agreement among competitors to restrain trade, anti-competitive behavior does not violate § 1." Pet. App. 40a. Accordingly, to establish their entitlement to relief under Federal Rule of Civil Procedure 8(a), plaintiffs must allege facts that, drawing all inferences in plaintiffs' favor, show the existence of such an agreement.

Noting the absence of direct factual allegations to support the existence of any actual agreement, Judge Lynch began his analysis by observing that "simply stating that defendants engaged in parallel conduct, and that this parallelism must have been due to an agreement, would be equivalent to a conclusory, 'bare bones' allegation of conspiracy" and "insufficient to withstand a motion to dismiss." *Id.* at 42a. The court, therefore, held that, "[i]n the context of parallel conduct claims, the basic requirement that plaintiffs must fulfill is to allege facts that, given the nature of the market, render the defendants' parallel conduct, and the resultant state of the market, suspicious enough to suggest that defendants are acting pursuant to a mutual agreement rather than their own individual self-interest." *Id.* at 46a. Such "plus factors include evidence that the parallel behavior would have been against individual defendants' economic interests absent an agreement, or that defendants possessed a strong common motive to conspire." *Id.* at 41a-42a. "[O]n a motion to dismiss[,] the Court may properly draw these background assumptions only from the facts pleaded in the complaint and the relevant statute, and may rely only on such background facts about the market and its history that are appropriate for judicial notice." *Id.* at 46a.

Plaintiffs failed to satisfy the applicable standard. With regard to plaintiffs' allegation that defendant ILECs conspired

to keep CLECs out of their individual markets, plaintiffs explicitly conceded that "it is in each ILEC's individual economic interest to attempt to keep CLECs out of its market." *Id.* at 48a. While each defendant might gain certain benefits from *other* incumbents' efforts to exclude CLECs, "[n]o agreement would be necessary for all ILECs to be relatively certain to reap the alleged added benefits to be gained from parallel action" and "the motives that plaintiffs have proffered do not provide any basis to infer" that defendants' conduct was the result of agreement. *Id.* at 50a.

With regard to plaintiffs' allegation that defendants agreed not to expand into each others' territories, the court noted that "geographic segregation . . . might be enough . . . to support an inference of conspiracy, in most industries, where one could view the defendants as non-monopolistic competitors who had . . . apparently arranged [the market] into a pattern of territorial fiefdoms." *Id.* at 47a. In this case, however, the Bell companies were "given monopolies in their respective territories" and were "prevented from [competing prior to 1996] by the entry barriers protecting each" company's territory. *Id.*

The court thus held that, "[i]n light of the structure of the market as evidenced by the allegations in the Amended Complaint and the provisions of the 1996 Act, . . . it is apparent that this conduct is also attributable to defendants' individual economic interests, and therefore does not raise an inference of conspiracy." *Id.* at 51a. The court carefully reviewed the history of regulation, the terms of the statute, and the allegations of the complaint – particularly those describing in detail the difficulties faced by new local service entrants – and concluded that "[f]or an ILEC to compete as a CLEC in an adjoining ILEC's territory would not be simply to extend their existing business into a neighboring region, but rather would be to invest in undertaking an entirely different kind of business." *Id.* at 57a. "Given the obstacles to becoming a successful CLEC, . . . [i]t is no more surprising, and raises no more inference of concerted action, that the

ILECs have not gone into business as CLECs than that they have all collectively failed to enter some other line of business." *Id.*

3. The Court of Appeals' Opinion

The Second Circuit reversed, concluding that "the district court applied an incorrect standard for evaluating the defendants' motion to dismiss." Pet. App. 10a-11a. The court of appeals held that allegations of parallel conduct coupled with a bald assertion that the defendants were participants in a "conspiracy" are sufficient to state a claim under Section 1. Accordingly, the court of appeals said that it did not even need to address the district court's conclusion that the facts alleged in the complaint failed to support any inference that the alleged parallel conduct was the result of a conspiracy rather than independent action in each defendant's economic self-interest. Under the proper standard, the court of appeals held, the district court's analysis was simply unnecessary. *Id.*

The court of appeals acknowledged that "a bare bones statement of conspiracy . . . without any supporting facts permits dismissal." *Id.* at 16a (internal quotation marks omitted). And the court stated that "[t]he factual predicate that is pleaded does need to include conspiracy among the realm of plausible possibilities." *Id.* at 19a (footnote omitted). But the court held that "a pleading of facts indicating parallel conduct by the defendants can suffice to state a plausible claim of conspiracy." *Id.* at 25a. "[T]o rule that allegations of parallel anticompetitive conduct fail to support a plausible conspiracy claim," the court stated, "a court would have to conclude that there is *no set of facts* that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence." *Id.* (emphasis added). Because it is almost always *possible* that parallel conduct, however unremarkable, was the result of an agreement, the court of appeals believed that any detailed analysis of the complaint of the sort performed by the

district court is not allowed in considering a motion to dismiss. *See id.* at 10a-11a.

Accordingly, the court of appeals held that "plaintiffs have satisfied their burden at the pleading stage." *Id.* at 30a. Devoting approximately three pages of the 43-page slip opinion to the issue, the court concluded that, "[w]hile the amended complaint does not identify specific instances of conspiratorial conduct or communications, it does set forth the temporal and geographic parameters of the alleged illegal activity and the identities of the alleged key participants," by which the court of appeals meant only that the conspiracy was alleged to have begun "around the time the Telecommunications Act became law" and that the "alleged key participants" were the named corporate defendants. *Id.* at 31a.[2]

The court of appeals said it was "mindful that a balance is being struck here, that on one side of that balance is the sometimes colossal expense of undergoing discovery, that such costs themselves likely lead defendants to pay plaintiffs to settle what would ultimately be shown to be meritless claims, that the success of such meritless claims encourages others to be brought, and that the overall result may well be a burden on the courts and a deleterious effect on the manner in which and efficiency with which business is conducted." *Id.* at 30a. But the court held that, "[i]f that balance is to be recalibrated, . . . it is Congress or the Supreme Court that must do so." *Id.*

The Second Circuit denied rehearing on January 3, 2006. *See id.* at 59a-60a.

---

[2] The Second Circuit suggested that allegations that ILECs attempted to exclude CLECs from their respective territories could constitute "parallel conduct against their self-interest," but explicitly did not rely on that suggestion in its ruling. Pet. App. 32a n.15. The suggestion is in any event paradoxical, given each ILEC's obvious self-interest to prevail over its CLEC rivals. *See* pp. 21-22, *infra*.

REASONS FOR GRANTING THE PETITION

The Second Circuit turned its back on substantive antitrust standards and the requirements of Rule 8 by holding that this complaint – which merely recites parallel business conduct and adds a bald assertion that the conduct is the result of a "conspiracy" – states a claim under Section 1. That decision conflicts with the decisions of other circuits and is inconsistent with this Court's precedent. The Second Circuit's decision has provided a roadmap for nuisance plaintiffs, inviting frivolous suits that burden courts and impose incalculable costs on antitrust defendants. And it frustrates fundamental antitrust policy by failing to recognize that parallel marketplace conduct is most often the result, not of conspiracy, but of the vigorous competition that the antitrust laws are designed to promote. This Court should grant certiorari to correct the Second Circuit's error, to unify the approach taken by the lower courts, and to forestall the avalanche of wasteful litigation that would otherwise result.

I. THE STANDARD ADOPTED BY THE COURT OF APPEALS CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND OTHER CIRCUITS

A. Because Unilateral But Parallel Conduct Is Lawful, a Complaint Alleging a Violation of Section 1 Based on Parallel Conduct Must Allege Additional Facts Supporting an Inference of Conspiracy

1. As Judge Lynch noted, the sufficiency of plaintiffs' complaint must be evaluated in light of substantive antitrust principles. First, the Sherman Act "contains a 'basic distinction between concerted and independent action.'" *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984) (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984)). "Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization." *Id.* at 768. By contrast, "Section 1 of the Sherman Act requires that there be a contract, combination . . . or conspiracy . . . in order to establish a violation.

Independent action is not proscribed." *Monsanto*, 465 U.S. at 761 (internal quotation marks and citation omitted; first ellipsis in original).

Second, mere "parallel" conduct by the defendants is not enough to show conspiracy. Simply stated, "there is no basis for inferring any kind of agreement from . . . mere parallel behavior." 6 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1410a, at 60 (2d ed. 2002) ("Areeda & Hovenkamp"). Similarly situated businesses may face common business problems or incentives and arrive at common decisions without regard to their competitors' decisions. Parallel conduct may even depend on the conduct of competitors, but nevertheless fail to imply the existence of any conspiracy. Thus, it has long been recognized that even interdependent conduct, known as "conscious parallelism," is "not in itself unlawful." *Id.*; *see also Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993) (competing firms may "recogniz[e] their shared economic interests" and act in parallel without violating Section 1); *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954) ("[T]his Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense."). To allow too-easy inference of conspiracy based on parallel conduct, the Court has stressed, would "deter or penalize perfectly legitimate conduct" and hence "both inhibit management's exercise of independent business judgment and emasculate the terms of the statute." *Monsanto*, 465 U.S. at 764.

Accordingly, in the absence of any direct evidence of conspiracy – for example, an admission of illegal collusion or written evidence of illegal agreement – "a plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently" – that is, without reaching an agreement that is prohibited by Section 1. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (quoting

Monsanto, 465 U.S. at 764). Such allegations – commonly referred to as "plus factors" – usually involve "a showing that the defendants' behavior would not be reasonable or explicable (i.e., not in their legitimate economic self-interest) if they were not conspiring to fix prices or otherwise restrain trade." *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1301 (11th Cir. 2003) (internal quotation marks omitted); *see also, e.g., In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360 (3d Cir. 2004), *cert. denied*, 125 S. Ct. 1699 (2005); *Viazis v. American Ass'n of Orthodontists*, 314 F.3d 758, 762, 764 (5th Cir. 2002); *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, Inc.*, 203 F.3d 1028, 1033 (8th Cir. 2000); *In re Citric Acid Litig.*, 191 F.3d 1090 (9th Cir. 1999).

2. The court of appeals held that these principles were inapplicable to plaintiffs' complaint because it was "reviewing the grant of a motion to dismiss, not the grant of a motion for summary judgment." Pet. App. 25a. The court instead held that, at the pleading stage, a plaintiff "must allege only the existence of a conspiracy" and a factual predicate that "include[s] conspiracy among the realm of 'plausible' possibilities." *Id.* And the court further held – relying on a 50-year-old decision of the Second Circuit, *Nagler v. Admiral Corp.*, 248 F.2d 319 (2d Cir. 1957) – that "a pleading of facts indicating parallel conduct by the defendants can suffice to state a plausible claim of conspiracy" unless "there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence." Pet. App. 25a.

The court of appeals' standard squarely conflicts with this Court's antitrust rulings. Parallel conduct is not unlawful. *See Theatre Enters.*, 346 U.S. at 541. Therefore, an allegation that defendants acted in parallel does not, without more, state a claim under the antitrust laws. Rather, where, as here, a plaintiff seeks to establish the factual predicate for a conspiracy through allegations of parallel conduct, this Court's rulings in *Monsanto* and *Matsushita* require factual allegations that, under the governing legal standard, would support

the conclusion that the parallel conduct was the result of an illegal agreement.[3]

Nothing in Rule 8 or Rule 12(b) or this Court's decisions interpreting those rules modifies the underlying substantive rules of antitrust law. On a motion to dismiss, factual allegations in the complaint must be accepted as true, while at summary judgment the plaintiff bears the burden of identifying evidence sufficient to establish each element of a claim. *Compare Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993), *with Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). But the legal standard under which the court evaluates the allegations for legal sufficiency is the same legal standard that the court applies at summary judgment. Thus, the complaint itself must allege facts that would state a claim under the substantive Section 1 standards established by this Court. *See* 5B Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357, at 544-48 (3d ed. 2004) ("[I]f the allegations in the complaint, taken as true, do not effectively state a claim for relief, the added assertion by the plaintiff that they do state a claim will not save the complaint.").

Judge Lynch captured the point exactly: "[t]he crucial inquiry . . . is what inferences naturally arise from the facts that plaintiffs have pled, taking all facts . . . as true." Pet. App. 46a. By contrast, the Second Circuit's test – which permits an inference of conspiracy from a mere allegation of parallel conduct – does not require plaintiffs to establish the legal sufficiency of their complaint. As the district court correctly concluded, the requirement that a plaintiff allege facts to support a claim of conspiracy under this Court's established standards is mandated both by the plain terms of Rule 8 –

---

[3] That collusion is one "plausible possibilit[y]" of parallel conduct does not, of course, mean that independent action is not also plausible, or even *more* plausible. The Second Circuit's mere-plausibility threshold therefore does not require facts that "'tend[] to exclude'" the independent-action possibility. *Matsushita*, 475 U.S. at 588 (quoting *Monsanto*, 465 U.S. at 764).

which requires the plaintiff to "show[ ] that [he] is entitled to relief," Fed. R. Civ. P. 8(a) – and by the core purpose of Rule 8 – which is to provide a defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests," *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

3. The court of appeals, citing this Court's decision in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), concluded that it was improper to burden plaintiffs alleging a conspiracy with any obligation to plead specific facts from which the existence of such a conspiracy could reasonably be inferred. But the court of appeals misunderstood *Swierkiewicz* and ignored this Court's later decision in *Dura Pharmaceuticals, Inc. v. Broudo*, 125 S. Ct. 1627 (2005).

In *Swierkiewicz*, this Court reversed an order of the Second Circuit affirming dismissal of a claim of employment discrimination based on national origin and age. The plaintiff alleged that the French chief executive fired him and replaced him with a younger, less qualified French employee. *See* 534 U.S. at 508. The Second Circuit held that the plaintiff had failed to allege facts "constituting a prima facie case of discrimination" under the Court's decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Swierkiewicz*, 524 U.S. at 509. A unanimous Court held that, "under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not apply in every employment discrimination case." *Id.* at 511. Instead, the plaintiff might be able to provide "direct evidence of discrimination." *Id.* Given that the complaint "detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved," the complaint gave the defendant "fair notice of what [the plaintiff's] claims are and the grounds upon which they rest" and "state[d] claims upon which relief could be granted." *Id.* at 514.

As the district court correctly ruled, *Swierkiewicz* does not suggest that plaintiffs' complaint meets Rule 8 standards. The requirement that a plaintiff plead facts sufficient to show a conspiracy "is simply not analogous" to the requirement, disapproved in *Swierkiewicz*, that a plaintiff plead a *prima facie* case of discrimination under Title VII of the Civil Rights Act of 1964. Pet. App. 44a. Unlike discrimination based on national origin, parallel conduct is not unlawful. Accordingly, "allowing simple allegations of parallel conduct to entitle plaintiffs to discovery circumvents both § 1's requirement of a conspiracy and Rule 8's requirement that complaints state claims on which relief can be granted." *Id.* And, unlike the complaint in *Swierkiewicz* – which alleged the who, what, where, when, and why facts underlying a straightforward legal claim – the complaint here contains a bare allegation of conspiracy that fails "to give defendants notice" of the factual basis for the legal claim. *Id.* at 45a. "[A] plaintiff's factual and economic theory of a conspiracy is not evident from a conclusory allegation of conspiracy, and there is simply no way to defend such a claim without having some idea of how and why the defendants are alleged to have conspired." *Id.*

Indeed, just three Terms later, a unanimous Court in *Dura Pharmaceuticals* made clear that *Swierkiewicz* had not altered the principle that the sufficiency of a pleading must be judged by reference to whether the facts alleged in the complaint satisfy the legal standards governing the plaintiff's claim. The Ninth Circuit had allowed a securities class action to proceed despite the plaintiffs' failure adequately to allege two elements of their claim for their securities fraud – proximate causation and economic loss. *See* 125 S. Ct. at 1629. The Court ruled, first, that to establish these two elements, the plaintiffs were required to prove not merely that they paid an "inflated purchase price" but also that the alleged misrepresentation proximately caused a loss, as those concepts have been traditionally understood. *See id.* at 1631-33. Second, and critical here, the Court ruled that its "hold-

ing about plaintiffs' need to *prove* proximate causation and economic loss leads us also to conclude that the plaintiffs' complaint here failed adequately to *allege* these requirements." *Id.* at 1634. Although the complaint alleged that the plaintiffs "paid artificially inflated prices" and had suffered "damages," "the complaint nowhere . . . provides the defendants with notice of what the relevant economic loss might be or of what the causal connection might be between that loss and the misrepresentation." *Id.*

The Second Circuit never discussed *Dura Pharmaceuticals*, but it is that decision that controls this case. The court of appeals held that, to survive a motion to dismiss, allegations of "facts indicating parallel conduct" are sufficient. Pet. App. 25a. But, because a plaintiff cannot establish a claim under Section 1 by *proving* that the defendants engaged in parallel conduct, a plaintiff cannot state a claim under Section 1 by *alleging* that the defendants engaged in parallel conduct. *See Dura Pharms.*, 125 S. Ct. at 1634.

It is no answer, as the Second Circuit seemed to assume, that plaintiffs "may not be required to establish 'plus factors' at trial – if, for example, they can prove conspiracy directly." Pet. App. 26a. That suggestion, relying entirely on what *might* ultimately be "prove[d]," effectively wipes away any requirement that the complaint actually *allege* sufficient facts to state a claim. In *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), another complex antitrust case, this Court upheld dismissal, cautioning that "[i]t is not . . . proper to assume that the [plaintiff] can prove facts that it has not alleged." *Id.* at 526 & n.11. Yet, here, the Second Circuit has done precisely what this Court held is not "proper": it has allowed the complaint to proceed because collusion is a "plausible possibilit[y]" based on a "set of facts" *not* alleged. Pet. App. 25a.

Some legally sufficient underlying facts must be alleged; yet, here there are none. No specifics of the conspiracy are

alleged: the complaint does not specify the participants, the time period, the terms of the agreement, the mechanism of enforcement, or any other facts that would permit defendants to defend against the change. A bare assertion of conspiracy is not enough. As this Court has held, "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Associated Gen. Contractors*, 459 U.S. at 528 n.17; *see also DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53, 55, 56 (1st Cir. 1999) (Boudin, J.) (referring to "ample" case law for the proposition that a "court is not required to accept" "[c]onclusory allegations" of "conspiracy" or "agreement" if divorced from "more specific allegation[s]"); *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 221 (4th Cir. 1994) ("[I]n order to adequately allege an antitrust conspiracy, the pleader must provide, whenever possible, some details of the time, place and alleged effect of the conspiracy; it is not enough merely to state that a conspiracy has taken place.") (internal quotation marks omitted); *Lombard's, Inc. v. Prince Mfg., Inc.*, 753 F.2d 974, 975 (11th Cir. 1985).

Accordingly, there can be no justification for dispensing, as the Second Circuit did, with the requirement that the complaint allege "plus factors" for inferring a conspiracy from parallel conduct. In the absence of agreement, there is no claim under Section 1, and a plaintiff cannot satisfy the essential element of the claim simply by asserting, without any supporting facts, that an agreement was reached. The only facts alleged in the complaint that could potentially support its naked allegation of conspiracy are the allegations of parallel conduct and the surrounding market circumstances. The complaint in fact *explicitly* relied on the inferences from defendants' parallel conduct as the sole basis for the conspiracy allegation. *See* Am. Compl. ¶ 51 ("In the absence of any meaningful competition . . . and in light of the parallel course of conduct . . . , Plaintiffs allege upon information and belief that Defendants have entered into a contract, combination or

conspiracy"). In this circumstance, substantive antitrust standards require that the complaint allege facts supporting the conclusory allegation of a conspiracy.

B. The Decision Below Conflicts with Decisions of Other Courts of Appeals

The Second Circuit's holding not only departs from this Court's decisions but also conflicts with the law of at least three other circuits. The Tenth, First, and Sixth Circuits have all required plaintiffs pleading a claim under Section 1 to allege facts that, if true, would support a claim of conspiracy. In these circuits, an allegation of parallel conduct accompanied by a bald allegation of conspiracy is *not* enough to survive a motion to dismiss; those courts regard complaints such as the one in this case to be insufficient as a matter of law.

In *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357 (10th Cir. 1989), the complaint alleged, *inter alia*, horizontal price fixing in violation of Section 1 based on allegedly parallel actions by transmission companies "to uniformly breach contracts with producers with an object and purpose of forcing producers to accept lower prices for natural gas." *Id.* at 1361 (internal quotation marks omitted). The Tenth Circuit affirmed dismissal of the complaint, holding that "[t]he antitrust plaintiff who relies on a theory of 'conscious parallelism' must establish that defendants engaged in consciously parallel action . . . which was contrary to their economic self-interest so as not to amount to a good faith business judgment." *Id.* (internal quotation marks omitted; ellipsis in original). Because the plaintiff "failed to allege *any* facts which would support an inference that the alleged actions by [the defendants] would be contrary to their economic interests absent an agreement," the complaint was properly dismissed. *Id.* The Second Circuit's decision, which did not cite or attempt to distinguish *Cayman Exploration*, and dispenses with any inquiry into whether the facts alleged suggest conduct inconsistent with independently pur-

sued self-interest, cannot be squared with the Tenth Circuit's decision.[4]

The First Circuit in *DM Research* likewise affirmed dismissal of a complaint that alleged a conspiracy to adopt faulty industry standards that had the effect of excluding the plaintiff's product from the market. Although, "[l]iterally read, the complaint does allege . . . a conspiracy," the court nevertheless held that it did not contain a sufficient "*factual* predicate" to support the conclusion that the defendants' conduct was the result of the conspiracy. 170 F.3d at 55-56. The First Circuit noted that "[c]onclusory allegations in a complaint, if they stand alone, are a danger sign that the plaintiff is engaged in a fishing expedition"; "terms like 'conspiracy,' or even 'agreement,' are border-line: they might well be sufficient *in conjunction with a more specific allegation* – for example, identifying a written agreement *or even a basis for inferring a tacit agreement* . . . but a court is not required to accept such terms as a sufficient basis for a complaint." *Id.* at 55, 56 (emphases added; citation omitted). The First Circuit concluded that "the discovery process is not available where, at the complaint stage, a plaintiff has nothing more than unlikely speculations. While this may mean that a civil plaintiff must do more detective work in advance, the reason is to protect society from the costs of highly unpromising litigation." *Id.* at 56.

The Second Circuit's decision also conflicts with the standard applied by the Sixth Circuit's decision in *NHL Players Association v. Plymouth Whalers Hockey Club*, 419 F.3d 462 (6th Cir. 2005). The court there held – applying circuit precedent derived from *Matsushita* – that a plaintiff could not allege a claim under Section 1 by pleading facts "equally consistent with independent conduct"; instead, a plaintiff must include allegations "showing that the defendants' ac-

---

[4] Because it failed even to cite, much less grapple with, *Cayman Exploration*, the Second Circuit's bland assertion that its holding "comports with the law of our sister circuits," Pet. App. 22a n.6, cannot be accepted.

tions, taken independently, would be contrary to their economic self-interest." *Id.* at 475 (internal quotation marks omitted). Only after applying that standard, and concluding that the complaint satisfied it, did the Sixth Circuit hold the complaint sufficient. The Second Circuit's decision in this case rejects the legal standard that was expressly applied in the Sixth Circuit and will govern conduct and future litigation there.

Accordingly, the circuits are sharply divided on the proper standards for pleading a Section 1 conspiracy. Given the importance of the Second Circuit for the nation's commerce, the liberal venue rules in antitrust suits against companies doing business nationwide, and the stark terms of the holding below – essentially, a rule barring the dismissal of Section 1 conspiracy claims based on parallel conduct – the Second Circuit is certain to become a magnet for frivolous antitrust claims, turning the circuit into the forum of choice for such suits. *See* pp. 26-28, *infra*.

II. APPLICATION OF THE CORRECT LEGAL STANDARD REQUIRES DISMISSAL OF THE COMPLAINT IN THIS CASE

This case provides a perfect vehicle to address the legal issue presented because – as Judge Lynch's careful analysis illustrates – the complaint does not state a claim under the correct legal standard. The complaint's allegations are entirely consistent with wholly *independent* business conduct and so fail to state facts sufficient for inferring conspiracy under the *Monsanto/Matsushita* standard. That is, taking the complaint's allegations as true, each defendant's conduct is fully explained by considerations of business self-interest irrespective of any agreement with – indeed, irrespective of the conduct of – the other defendants.

A. The complaint is based on two supposed agreements. The first is an agreement to frustrate rivals' efforts to enter each of the defendants' respective markets by failing to live up to the network-sharing obligations of the 1996 Act. *See*

Am. Compl. ¶ 47. There is nothing suspicious from the point of view of antitrust law, however, about an incumbent's alleged reluctance to comply with the 1996 Act's sharing obligations. As this Court has recognized, the dealing with rivals that the 1996 Act requires is not something that an incumbent would ever "voluntarily" undertake. *Trinko*, 540 U.S. at 409. "The sharing obligation imposed by the 1996 Act created 'something brand new' . . . . The unbundled elements . . . exist only deep within the bowels of [the incumbent carriers]; they are brought out on compulsion of the 1996 Act and offered not to consumers but to rivals, and at considerable expense and effort." *Id.* at 410. The very purpose of these obligations is to "eliminate the monopolies enjoyed by the inheritors of AT&T's local franchises" by providing competitors access to the incumbent's network at cut-rate prices. *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 476 (2002). "Given that each ILEC has reason to want to avoid dealing with CLECs and having to 'subsidize' their entry into the market, each ILEC would attempt to keep CLECs out, regardless of the actions of the other ILECs." Pet. App. 49a.

Plaintiffs also alleged that defendants had "common motives to conspire" because "any CLEC that succeeded in one ILEC's territory would be more likely to 'present a competitive threat' in other ILECs' territories." *Id.* As the district court correctly observed, however, "[t]he asserted motivations to make an agreement . . . are not considerations that would affect [an ILEC's] initial decision as to whether or not to fight the CLECs in its own market." *Id.* Each defendant "could rationally expect that each of [the others] will reach the same conclusion . . . . No agreement would be necessary for all ILECs to be relatively certain to reap the alleged added benefits to be gained" from other defendants' resistance to CLECs' efforts. *Id.* at 49a-50a.[5]

---

[5] The district court's observation pays heed to this Court's analysis in *Monsanto*, which sharply limited the permissible inferences of agreement even in situations where observed conduct (*i.e.*, termination of a price-

B. The district court likewise properly dismissed the claim that defendants agreed to limit competition in each others' territories. Plaintiffs did not allege that firms currently in competition allocated the market by passing up available sales opportunities. Rather, the complaint alleged that each defendant declined to enter a *new line of business* – specifically, competition as a CLEC outside of its traditional service territory – which the complaint itself gives ample reasons for each defendant to avoid on its own independent determination.

Thus, the district court explained that the complaint itself recognized that "being a CLEC in another ILEC's territory is an entirely different business than being an ILEC." Pet. App. 51a. While the incumbent carrier "controls and maintains . . . telecommunications infrastructure," new entrants are "dependent on [their] relationship with the local ILEC." *Id.* at 51a-52a; *see also* Am. Compl. ¶ 47(*l*) ("Each Defendant[ ] possess[es] the exclusive and sole source of entry into its own local telephone and/or high speed internet services market").

That dependency provides ample reasons for each defendant independently to decide not to enter this different business. *See* Pet. App. 51a-58a. Like any new entrant, an ILEC competing out-of-region would "depend on the relevant ILEC"; and the profitability of the new entrant "will depend in substantial part on the terms that can be negotiated with the ILEC . . . and whether the ILEC fulfills its obligations" (*id.* at 52a), which – according to a central allegation of the complaint – the ILEC will resist doing. Those facts – from plaintiffs' own complaint – demonstrate that a decision not to devote scarce resources to the risky enterprise of becoming a

---

cutting dealer) is consistent with conspiracy and where competing dealers have a motive to secure such an agreement. *See, e.g., Euromodas, Inc. v. Zanella, Ltd.*, 368 F.3d 11, 20-21 (1st Cir. 2004) (action by manufacturer in response to complaint by dealer does not support inference that agreement existed). The key question is whether the conduct is consistent with independent business self-interest.

CLEC – an enterprise subject to the ILECs' control and littered with the bodies of failed competitors – is perfectly rational and explicable on its own terms for each defendant acting entirely out of independently determined self-interest. Such facts – again, facts stated in the complaint itself – are the very opposite of the facts needed to *exclude* the possibility of independent action.[6]

"[A]n awareness of the significance of regulation," *Trinko*, 540 U.S. at 411, supports dismissal in another respect as well. Defendants have been intensely supervised by state and federal regulators since the passage of the 1996 Act. *See id.* at

---

[6] Plaintiffs relied on the statement of Qwest CEO Richard Notebaert – who said that competing as a CLEC "might be a good way to turn a quick dollar but that doesn't make it right," Am. Compl. ¶ 42 – as support for the claim that competition as a CLEC presented an attractive business opportunity. As the district court rightly observed, Mr. Notebaert's statements "suggest only that he did not consider becoming a CLEC to be a sound long-term business plan" because "the legal landscape in which CLECs operate could have changed at any time." Pet. App. 56a. Indeed, later in the same article quoted by plaintiffs, Mr. Notebaert, while discussing the regulatory regime that requires incumbent firms to sell network elements to rivals at wholesale prices, is quoted as saying: "'I don't think it's a sustainable economic model.' . . . 'It's just a nuts pricing model.'" Jon Van, *Ameritech Customers Off Limits: Notabaert*, Chi. Trib., Oct. 31, 2002, at Business p.1. Moreover, another article cited in the complaint confirms that Mr. Notebaert believed that the relevant FCC rules would be "revised next year" and that it would be "*unwise* to base a business plan" on their continuation. Jon Van, *Lawmakers Seek Probe of Bells; Do Firms Agree Not To Compete?*, Chi. Trib., Dec. 19, 2002, at Business p.2 (emphasis added). In fact, although FCC regulations gave CLECs a temporary boost, incumbent LECs' network-sharing obligations have been substantially reduced as a result of judicial decisions and new FCC rulemaking. *See generally* Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 (2005), *petitions for review pending, Covad Communications Co. v. FCC*, Nos. 05-1095, *et al.* (D.C. Cir., to be argued March 21, 2006). Actions that are in a party's "long-run interest" are not "contrary to its self-interest" and thus "tell[ ] us nothing about possible conspiracy." 6 Areeda & Hovenkamp ¶ 1415e, at 99-100.

412 ("To be allowed to enter the long-distance market in the first place, an incumbent LEC must be on good behavior in its local market."). In that climate of constant scrutiny, no government enforcement official has suggested that parallel reluctance to enter into new markets (or parallel resistance to CLECs' demands) is suggestive of conspiracy. To the contrary, the Assistant Attorney General for Antitrust testified before Congress that he was "familiar" with the conduct that is cited in the complaint but did not believe it constituted evidence of an antitrust violation. *Antitrust Enforcement Agencies – The Antitrust Division of the Department of Justice and the Bureau of Competition of the Federal Trade Commission: Hearing Before the Task Force on Antitrust of the House Comm. on the Judiciary*, 108th Cong., 1st Sess. 77, 79 (July 24, 2003) (Testimony of R. Hewitt Pate). He testified that, "[i]f at any time we think that we have evidence of a concerted agreement to allocate markets, or to decline to compete, we will act very aggressively against it," but that the Antitrust Division "monitor[s] this situation very closely" and was "not aware of evidence of any such agreement" by the ILECs. *Id.*

More generally, it is difficult to imagine that any allegation that defendants "in parallel" failed to enter a new line of business or exploit an untested opportunity would support an inference of conspiracy. Firms have multiple demands on scarce capital, new entry is always risky, and a firm can exploit only a small fraction of available opportunities. Where, as a result of historical accident or deliberate design, two firms compete in adjacent territories, the failure of one to compete in another's region is not evidence even of interdependence: as stated in the leading antitrust treatise, there is no reason to believe that the decision turns on the possibility of retaliatory entry. *See* 6 Areeda & Hovenkamp ¶ 1410c, at 64 (failure of rivals to "sell in the other's area although each is capable of doing so" is *not* evidence of interdependence).

The inherent uncertainty of new entry is reflected in the rule of antitrust law that a plaintiff that claims to be a poten-

tial entrant is denied antitrust standing to challenge exclusionary conduct *unless* the plaintiff has taken "actual and substantial affirmative steps toward entry, such as the consummation of relevant contracts and procurement of necessary facilities and equipment." *Andrx Pharms., Inc. v. Biovail Corp.*, 256 F.3d 799, 807 (D.C. Cir. 2001) (internal quotation marks omitted); *see also, e.g., In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 11 F.3d 1460, 1465 (9th Cir. 1993); *Out Front Productions, Inc. v. Magid*, 748 F.2d 166, 170 (3d Cir. 1984) ("[A] company expanding either into a new geographic territory or product line . . . must show not only that it had the background, experience, and financial ability to make a viable entrance, but even more important, that it took affirmative actions to pursue the new line of business."). That limitation on standing makes sense precisely because a variety of factors – not least the availability of more attractive opportunities elsewhere – may lead a firm to pass up what may appear to others to be a potentially profitable new venture. And that limitation underscores the inappropriateness of inferring agreement from the type of parallel *in*action alleged here.

III. THE CASE PRESENTS A RECURRING ISSUE OF SUBSTANTIAL IMPORTANCE

A. The standard adopted by the Second Circuit invites frivolous litigation, imposing significant burdens on the courts and on private businesses. Indeed, the Second Circuit squarely acknowledged the perverse incentives that its rule creates. *See* Pet. App. 30a. By allowing plaintiffs to "drag[] a defendant past the pleading threshold," *DM Research*, 170 F.3d at 55 (internal quotation marks omitted), based on allegations of parallel conduct – combined with a conclusory allegation of conspiracy – the Second Circuit encourages the filing of suits solely to extract settlements that enrich attorneys at the expense of consumers and the economy as a whole. Nothing is easier than to allege that parallel conduct is the product of a conspiracy, if no supporting facts are required to support that allegation. But, as the Court held

unanimously in *Dura Pharmaceutcals*, defendants should not be put through the expense of litigation unless plaintiffs meet the burden of pleading a viable claim.

Antitrust suits are proverbially complex and expensive to litigate. "Because of the complexity of the issues and the breadth of the discovery allowed, antitrust cases have become known as 'serpentine labyrinths' in which discovery is a 'bottomless pit.'" 6 James Wm. Moore, *et al.*, *Moore's Federal Practice* ¶ 26.46[1], at 26-146.24 (3d ed. 2003). Precisely because discovery in antitrust cases is especially burdensome, lowering the bar at the pleading stage by relaxing substantive antitrust rules "condemn[s] defendants to potentially limitless 'fishing expeditions' – discovery pursued just 'in case anything turn[s] up' – in hopes . . . of a favorable settlement." Pet. App. 27a (footnotes omitted; second alteration in original). Commentators have noted that "[t]he risks associated with antitrust class actions . . . dictate that most cases will be on the fast track to settlement shortly after class certification, long before a summary judgment motion or merits adjudication of any kind can play a role." John T. Delacourt, *Protecting Competition by Narrowing Noerr: A Reply*, 18 Antitrust 77, 78 (2003).

Such settlements are contrary to antitrust policy because they hurt the very consumers that antitrust rules are designed to protect; the costs of extortionate settlements are (at least in part) inevitably passed on to consumers, while the threat of facing a burdensome strike suit may actually *discourage* aggressive competition by companies that fear their rational business decisions will be mistaken for collusive behavior. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a consumer welfare prescription.") (internal quotation marks omitted). Mindful of that concern, this Court has admonished that district courts "must be especially alert to identify frivolous claims brought to extort nuisance settlements," expressing confidence that antitrust litigation "need not result in administrative chaos, class-action harassment, or 'windfall' settlements *if the dis-*

trict courts exercise sound discretion and use the tools available." *Id.* at 345 (emphasis added). One of those tools, specifically endorsed by this Court in *Associated General Contractors*, is to demand that a plaintiff plead the elements of his antitrust claim with appropriate specificity. *See* 459 U.S. at 528. The district court here did precisely that, yet the Second Circuit reversed, taking this tool away from district courts and inviting the very nuisance suits that this Court condemned. *See also Dura Pharms.*, 125 S. Ct. at 1634 (noting danger of permitting "a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the [discovery] process will reveal relevant evidence") (internal quotation marks omitted; alteration in original).

The United States made a comparable point in successfully urging *certiorari* in the securities law context in *Dura*. The Government observed that efforts "to ensure the integrity of the securities markets, and thereby protect the investing public . . . are likely to be hindered rather than furthered by permitting private . . . suits to proceed past the pleading stage" without proper supporting allegations. Brief for the United States as Amicus Curiae at 14, *Dura Pharms., Inc. v. Broudo*, No. 03-932 (U.S. filed May 28, 2004) ("U.S. *Dura Pharms.* Br."). "[R]equiring issuers of securities to expend time and resources litigating, and in most cases settling, such lawsuits . . . is more likely to harm than to aid 'the intended beneficiaries'" of the statute. *Id.* Precisely the same is true here: the "colossal" cost of litigating suits that the Second Circuit frankly characterized as "meritless," Pet. App. 30a – avoidable only through the payment of "blackmail settlements," Henry J. Friendly, *Federal Jurisdiction* 120 (1973) – imposes a tax on legitimate business conduct for the benefit of a small cadre of plaintiffs' lawyers, to the detriment of all consumers.

B. The case's interlocutory posture should pose no obstacle to review. Where the very issue presented is the proper

standard for dismissal at the pleading stage, review of the decision at that stage is particularly appropriate. Moreover, many of this Court's leading antitrust precedents were decided upon review of appellate decisions reversing dismissal (including two recent Second Circuit cases that this Court unanimously reversed).[7] In those cases, as here, the court of appeals had "decided an important issue, otherwise worthy of review, and Supreme Court intervention [could] serve to hasten or finally resolve the litigation." Robert L. Stern, *et al.*, *Supreme Court Practice* § 4.18, at 260 (8th ed. 2002).

Indeed, immediate review is imperative to forestall the dangers that the Second Circuit itself anticipated likely would flow from its holding. Particularly in light of the unusual commercial importance of the Second Circuit as a forum and the liberal venue rules under the Sherman Act for companies doing business nationwide, there is every reason to expect that would-be plaintiffs will take advantage of this permissive precedent and shun jurisdictions that apply ordinary antitrust standards at the pleading stage. "And while review by this Court could be sought in a case in which some other court of appeals affirmed the dismissal of a complaint . . . many class-action counsel would be reluctant to seek certiorari in such a case because of the risk of affirmance, which would make that standard applicable nationwide." U.S. *Dura Pharms.* Br. at 18-19. Resolution of this critical issue of antitrust law should not wait.

CONCLUSION

The petition for a writ of certiorari should be granted.

---

[7] *See, e.g., Trinko*, 540 U.S. 398; *NYNEX*, 525 U.S. 128; *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322 (1991); *Hoover v. Ronwin*, 466 U.S. 558 (1984); *Associated Gen. Contractors*, 459 U.S. 519; *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982); *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531 (1978); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

Respectfully submitted,

STEPHEN M. SHAPIRO
KENNETH S. GELLER
RICHARD J. FAVRETTO
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

LAURA J. COLEMAN
J. HENRY WALKER
MARC W.F. GALONSKY
ASHLEY WATSON
BELLSOUTH CORPORATION
1155 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 249-2720
Counsel for BellSouth Corporation

JOHN THORNE
PAUL J. LARKIN, JR.
DAVID E. WHEELER
ROBERT J. ZASTROW
VERIZON COMMUNICATIONS INC.
1515 North Courthouse Road
Arlington, Virginia 22201
(703) 351-3900

DAN K. WEBB
CHARLES B. MOLSTER III
WINSTON & STRAWN LLP
35 W. Wacker Drive
Chicago, Illinois 60601
(312) 558-5856

RICHARD G. TARANTO
FARR & TARANTO
1220 19th Street, N.W., Suite 800
Washington, D.C. 20036
(202) 775-0184
Counsel for Verizon Communications Inc. (successor-in-interest to Bell Atlantic Corporation)

MICHAEL K. KELLOGG
Counsel of Record
MARK C. HANSEN
SEAN A. LEV
AARON M. PANNER
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

JAVIER AGUILAR
WILLIAM M. SCHUR
AT&T SERVICES, INC.
175 E. Houston Street, 2d Floor
San Antonio, Texas 78205
(210) 351-3409
Counsel for AT&T Inc. (formerly SBC Communications Inc.)

SETH P. WAXMAN
WILLIAM J. KOLASKY
WILMER CUTLER PICKERING HALE AND DORR LLP
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6357

TIMOTHY BEYER
BROWNSTEIN HYATT & FARBER, P.C.
410 17th Street, 22nd Floor
Denver, Colorado 80202
(303) 223-1116

CYNTHIA P. DELANEY
QWEST COMMUNICATIONS INTERNATIONAL INC.
1801 California Street
Denver, Colorado 80202
(303) 383-6790
Counsel for Qwest Communications International Inc.

March 6, 2006

APPENDIX

TABLE OF CONTENTS

Page

Opinion of the United States Court of Appeals for the Second Circuit, *Twombly, et al. v. Bell Atlantic Corp., et al.*, No. 03-9213 (Oct. 3, 2005) 1a

Opinion of the United States District Court for the Southern District of New York, *Twombly, et al. v. Bell Atlantic Corp., et al.*, No. 02 Civ. 10220 (GEL) (Oct. 8, 2003) 35a

Order of the United States Court of Appeals for the Second Circuit Denying Rehearing, *Twombly, et al. v. Bell Atlantic Corp., et al.*, No. 03-9213 (Jan. 3, 2006) 59a

Statutory Provisions Involved:

15 U.S.C. § 1 ..... 61a

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 03-9213

WILLIAM TWOMBLY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, AND LAWRENCE MARCUS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs-Appellants,

v.

BELL ATLANTIC CORPORATION, BELLSOUTH CORPORATION, QWEST COMMUNICATIONS INTERNATIONAL, INC., SBC COMMUNICATIONS INC., AND VERIZON COMMUNICATIONS INC.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of New York

[Argued Sept. 15, 2004]

[Decided Oct. 3, 2005]

Before: SACK, RAGGI, and HALL, Circuit Judges.

SACK, Circuit Judge.

In an amended complaint filed in the United States District Court for the Southern District of New York, the plaintiffs allege that the defendant telecommunications providers[1] con-

---

[1] The defendants-appellees are: Bell Atlantic Corp. ("Bell Atlantic"), BellSouth Corp. ("BellSouth"), Qwest Communications International,

spired not to compete against one another in their respective geographic markets for local telephone and high-speed Internet services, and to prevent competitors from entering those markets, in violation of Section 1 of the Sherman Act. At the time the complaint was filed, Section 1 provided:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1 (2000) (amended 2004).[2] The district court (Gerard E. Lynch, *Judge*) concluded that the amended complaint fails to allege sufficient facts from which a conspiracy can be inferred and therefore granted the defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted.

Because we disagree with the standard that the district court applied in reviewing the sufficiency of the plaintiffs' allegations, we vacate its judgment and remand for further proceedings.

Inc. ("Qwest"), SBC Communications Inc. ("SBC"), and Verizon Communications Inc. ("Verizon").

[2] The penalty provisions of the Sherman Act were amended on June 22, 2004, after this appeal was filed, to increase the maximum fines to $100,000,000 for a corporation and $1,000,000 for any other person, or imprisonment of up to ten years, or both. *See* Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub.L. No. 108-237, tit. II, § 215(a), 118 Stat. 661, 668.

BACKGROUND

This case arises in the wake of the Telecommunications Act of 1996, Pub L. No. 104-104, 110 Stat. 56 (codified at scattered sections of Titles 15 and 47 of the United States Code) ("Telecommunications Act" or the "Act"), which was designed to promote competition in the market for local telephone service. *Twombly v. Bell Atl. Corp.*, 313 F.Supp.2d 174, 177 (S.D.N.Y.2003). The Act requires that the defendants – so-called "Baby Bells" or "Incumbent Local Exchange Carriers" ("ILECs"), which were created following the 1984 breakup of the American Telephone & Telegraph Co. ("AT & T") – open their government-sanctioned regional monopolies over local telephone service to competition from so-called "Competitive Local Exchange Carriers" ("CLECs"), including by allowing CLECs to connect their own telephone networks to those of the ILECs, by providing the CLECs with access to the ILECs' network elements for "just, reasonable, and nondiscriminatory" rates, and by allowing the CLECs to purchase the ILECs' telecommunications services at wholesale rates for resale to subscribers. 47 U.S.C. § 251(c); *Twombly*, 313 F.Supp.2d at 177. In exchange, the Act permits the ILECs to enter the market for long-distance service in which they were prohibited from participating since the breakup of AT & T. 47 U.S.C. § 271; *Twombly*, 313 F.Supp.2d at 177.

The plaintiffs allege that the defendants, motivated by the desire to protect their respective geographic monopolies and otherwise unsustainable profit margins, have resisted the mandate of the 1996 Telecommunications Act by conspiring with one another to keep CLECs from competing successfully in the defendants' respective territories. *Twombly*, 313 F.Supp.2d at 177-78. The plaintiffs also allege that the defendants, who among them control more than ninety percent of the market for local telephone service in the United States, Amended Complaint ("Am.Compl.") ¶ 48, have agreed not to compete with one another in their respective territories, *id.* ¶¶ 40-41; *Twombly*, 313 F.Supp.2d at 178. According to the

plaintiffs, the result of this alleged conspiracy has been to drive CLECs out of business, to restrain competition in the market for local telephone and high-speed Internet services, and to injure the plaintiffs by forcing them, as consumers of those services, to pay at rates higher than they would otherwise pay in a competitive environment. *Twombly*, 313 F.Supp.2d at 178.

The amended complaint alleges several factual bases for its far-reaching claims of a two-pronged antitrust conspiracy.

Agreement Not to Compete

As an initial matter, the plaintiffs allege "parallel conduct" on the part of the ILECs in not competing with each other, which they assert "would be anomalous in the absence of an agreement . . . not to compete." Am. Compl. ¶ 40. Specifically, they allege that for various historical reasons, the defendants' respective service territories are not entirely contiguous, with some of the defendants serving pockets of territory that are entirely surrounded by the territories of their supposed competitors. *Id.* ¶¶ 40-41. For example, according to the allegations, defendant SBC serves most of the State of Connecticut, even though defendant Verizon serves the surrounding northeastern states, and SBC also serves California and Nevada, even though defendant Qwest serves the surrounding western states. *Id.* ¶ 40. Similarly, Verizon serves many small patches of territory in various western and midwestern states that are otherwise primarily served by SBC. *Id.* While the plaintiffs contend that these geographic anomalies should provide Verizon and Qwest with "substantial competitive advantages" in competing with SBC for business in Connecticut, and California and Nevada, respectively, and SBC with similar advantages in competing with Verizon in the west and midwest, none of those companies has sought to compete with the others "in a meaningful manner." *Id.* ¶ 41. The plaintiffs deem this to be a situation that would be "unlikely" absent an agreement not to compete. *Id.* They suggest that this result is especially odd in that the defendants

have publicly complained that the Telecommunications Act hurts their businesses by forcing them to provide CLECs with access to their networks at rates that are below the cost of maintaining those networks. *Id.* ¶ 39. By this same economic logic, the plaintiffs argue, the ILECs should be scrambling to compete with one another as CLECs, thereby benefitting from inexpensive access to their competitors' networks. *Id.*

The plaintiffs also point to a statement allegedly made by Richard Notebaert, the current Chief Executive Officer of defendant Qwest and the former Chief Executive Officer of Ameritech Corp., which merged with defendant SBC in 1999. *Id.* ¶ 42. In a newspaper article published in October 2002, Notebaert was quoted as saying that for Qwest, competing in the territory of SBC/Ameritech "might be a good way to turn a quick dollar but that doesn't make it right." *Id.* (quoting Jon Van, *Ameritech Customers Off Limits: Notebaert*, Chi. Trib., Oct. 31, 2001, at Business 1). According to the plaintiffs, that statement, coming at a time when Qwest's revenues were declining and it was losing money, constituted an admission of collusive conduct among the ILECs. *Id.* ¶¶ 42-44.

And the plaintiffs point to a letter from two members of the House of Representatives to then-Attorney General John Ashcroft requesting that the Department of Justice investigate the extent to which the Baby Bells' "very apparent non-competition policy in each others' markets is coordinated." *Id.* ¶ 45 (quoting Letter from Rep. John Conyers Jr. and Rep. Zoe Lofgren to Att'y Gen. John D. Ashcroft (Dec. 18, 2002)).

In addition, the plaintiffs assert that the defendants communicate frequently with one another "through a myriad of organizations," providing an opportunity for a conspiracy to form and be conducted without the likelihood of detection. *Id.* ¶ 46. At the same time, they assert that "[t]he structure of the market for local telephone services is such as to make a market allocation agreement feasible" even in the absence of frequent communications, in part because "[i]f one of the [d]efendants had broken ranks and commenced competition in

another's territory the others would quickly have discovered that fact." *Id.* ¶¶ 48-49.

Agreement to Prevent CLECs from Competing Successfully

The plaintiffs further allege that from the day of the Telecommunications Act's enactment until the present, the defendants have sought to interfere with the ability of CLECs to compete successfully, including by negotiating "unfair agreements" with CLECs for access to the ILECs' telephone networks, by providing CLECs with poor quality connections to those networks, and by interfering with the CLECs' relationships with the CLECs' own customers, such as by continuing to bill customers even after they have entered agreements for services with CLECs. *Twombly*, 313 F.Supp.2d at 177-78; Am. Compl. ¶¶ 47, 64.

The plaintiffs cite a report by a consumer group, the Consumer Federation of America ("CFA"), which suggested that the defendants "'have refused to open their markets by dragging their feet in allowing competitors to interconnect, refusing to negotiate in good faith, litigating every nook and cranny of the law, and avoiding head-to-head competition like the plague.'" *Id.* ¶ 47 (quoting Consumer Fed'n of Am., *Lessons From 1996 Telecommunications Act: Deregulation Before Meaningful Competition Spells Consumer Disaster* 1 (Feb.2001)).

The plaintiffs allege that the defendants share a common motivation for their behavior in preventing the CLECs from competing because, were any one of the ILECs to allow meaningful competition in the geographic area it controls, "the resulting greater competitive inroads into that [d]efendant's territory would [reveal] the degree to which competitive entry by CLECs would [be] successful in the other territories in the absence of such conduct." Am. Compl. ¶ 50. Moreover, they contend, "the greater success of any CLEC that made substantial competitive inroads into one [d]efendant's territory would [enhance] the likelihood that

such a CLEC might present a competitive threat in other [d]efendants' territories as well." *Id.*

The District Court's Decision

In dismissing the plaintiffs' amended complaint, the district court concluded that the allegations of "conscious parallelism" of the defendants' actions, taken by themselves, are not sufficiently probative, on a motion to dismiss, of conspiratorial intentions that would support a finding of antitrust-law violations. *Twombly*, 313 F.Supp.2d at 179-82, 184, 189. Instead, applying this Circuit's case law with respect to Sherman Act claims at the summary judgment stage, the court required the plaintiffs to "establish[ ] at least one 'plus factor' that tends to exclude independent self-interested conduct as an explanation for defendants' parallel behavior." *Id.* at 179. Such a factor, the court noted, could be, for example, "evidence that the parallel behavior would have been against individual defendants' economic interests absent an agreement, or that defendants possessed a strong common motive to conspire." *Id.* (citing *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 253-54 (2d Cir.1987), *cert. denied*, 484 U.S. 977, 108 S.Ct. 489, 98 L.Ed.2d 487 (1987), and *cert. denied sub nom. Coastal Corp. v. Apex Oil Co.*, 484 U.S. 977, 108 S.Ct. 489, 98 L.Ed.2d 487 (1987)). While acknowledging that applying this standard in the context of a motion to dismiss "is somewhat in tension with Fed.R.Civ.P. 8, which requires only a 'short and plain statement of the claim,'" *id.* at 180 (quoting Fed.R.Civ.P. 8), the court concluded that such a standard is nonetheless appropriate for two reasons. First, it wrote, insofar as parallel behavior by competing companies is not itself illegal absent an agreement to restrain trade, "the doctrine of conscious parallelism [would] allow[ ] plaintiffs to state a claim by alleging conduct that is, in itself, not prohibited by § 1 of the Sherman Act." *Id.* at 181. Accordingly, the court concluded, "allowing simple allegations of parallel conduct to entitle plaintiffs to discovery circumvents both § 1's requirement of a conspiracy and Rule 8's requirement that complaints state claims on which relief can be granted." *Id.* Sec-

ond, the court continued, "allegations of plus factors are necessary to give defendants notice of plaintiff's theory of the conspiracy." *Id.* "[T]here is simply no way to defend against such a claim without having some idea of how and why the defendants are alleged to have conspired." *Id.*

Applying that standard, the court concluded that the plaintiffs fail to allege facts "suspicious enough to suggest that defendants are acting pursuant to a mutual agreement rather than their own individual self-interest." *Id.* at 182. First, given the ILECs' stated opposition to the pricing structure imposed by the Telecommunications Act, the court wrote, their "parallel action" to "attempt to discourage CLECs from entering the market and to render it difficult for them to survive once they had entered . . . does not naturally give rise to an inference of an agreement, since the behavior of each ILEC in resisting the incursion of CLECs is fully explained by the ILEC's own interests in defending its individual territory." *Id.* at 183.

Second, the district court also rejected the plaintiffs' claim that the defendants conspired not to compete against one another in their respective markets even though such behavior might have been financially advantageous to them in the short term. The court suggested that the plaintiffs' theory of the case erroneously assumes that operating a telephone business as an ILEC is substantially similar to operating a telephone business as a CLEC in territory controlled by another company. *Id.* at 185. In fact, the court wrote, the two businesses are "entirely different"; while ILECs are "self-sufficient," CLECs are "completely dependent" on their contractual relationships with the ILECs in whose territories they operate. *Id.* As a result, "an ILEC's market power in its home territory does not translate into market power as a CLEC in another ILEC's territory," such that "ILECs acting as CLECs are in much the same position as other, smaller, CLECs." *Id.* at 186. Even brand recognition and geographic proximity do not help, the court wrote, because the ILEC competing as a CLEC "is still dependent on its relationship with the [local] ILEC for survival." *Id.* at 186-87.

Moreover, the court noted, the plaintiffs' own allegations of how difficult it is to operate a successful CLEC cast doubt on their assertion that ILECs should be expected to attempt to compete with one another as CLECs in their respective territories. *Id.* at 187. "Plaintiffs' allegations raise the inference that each ILEC is well aware that becoming a CLEC in another market would be extremely difficult in the face of opposition from the local ILEC, because it is using the same tactics against CLECs in its market." *Id.* Accordingly, "there is no apparent reason for an ILEC to attempt to push out of its own territory and brave the barriers thrown up by other ILECs." *Id.*

Finally, the court rejected the plaintiffs' contention that the statement by Qwest CEO Notebaert in any way suggests collusion among the defendants. *Id.* at 188. "Considered in context," the court reasoned, "Notebaert's statement[] suggest[ed] only that he did not consider becoming a CLEC to be a sound long-term business plan, because all of the ILECs were challenging [47 U.S.C.] § 251 and its pricing structure through litigation, and the legal landscape in which CLECs operate could have changed at any time." *Id.*

The district court therefore granted the defendants' motion to dismiss the plaintiffs' complaint in its entirety. *Id.* at 189. The plaintiffs appeal.

DISCUSSION

On appeal, the plaintiffs argue principally that the district court erred by applying, on a motion to dismiss, a heightened, "plus factors" standard of pleading ordinarily applicable as the standard of proof at the summary judgment and trial stages. In addition, the plaintiffs contend that even were there a "plus factors" pleading requirement, the district court erred in applying that standard by not accepting all of the plaintiffs' allegations as true and by not drawing all inferences in their favor. Because we conclude that the district court applied an incorrect standard for evaluating the defendants' motion to

dismiss, we need not, and therefore do not, reach the plaintiffs' second argument.

I. Standard of Review

We review *de novo* the dismissal of a complaint for failure to state a claim, accepting as true all facts alleged in the complaint and drawing all inferences in favor of the plaintiff. *Todd v. Exxon Corp.*, 275 F.3d 191, 197 (2d Cir.2001). "A complaint should not be dismissed for failure to state a claim 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Id.* at 197-98 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). "At the pleading stage . . . the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co. of N.Y.*, 375 F.3d 168, 177 (2d Cir.2004) (citation, brackets, and internal quotation marks omitted).

II. The Notice Pleading Standard

A. General Principles

Fed.R.Civ.P. 11(b) provides:

> By presenting to the court . . . a pleading . . . an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, [the pleading is presented for a proper purpose, and] –
>
> . . . .
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support

> after a reasonable opportunity for further investigation or discovery . . . .

Id. At least in theory, then, when a complaint is filed by counsel, it arrives at the door of the district court with the warrant of counsel that "allegations and other factual contentions" contained in the complaint "have evidentiary support or, if specifically so identified" – presumably by being stated as being "to the best of [his or her] knowledge, information, and belief" – "are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." *Id.* 11(b)(3).

As for the contents of the complaint, Rule 8(a) provides only that it "shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends . . . , (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks." Fed.R.Civ.P. 8(a); *see also id.*, Rule 8(e)(1) ("Each averment of a pleading shall be simple, concise, and direct."). As the Supreme Court recognized nearly half a century ago, the Rules thus set forth a pleading standard under which plaintiffs are required to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Conley*, 355 U.S. at 47, 78 S.Ct. 99. "Fair notice" is "that which will enable the adverse party to answer and prepare for trial, allow the application of res judicata, and identify the nature of the case so that it may be assigned the proper form of trial." *Simmons v. Abruzzo*, 49 F.3d 83, 86 (2d Cir.1995) (citation and internal quotation marks omitted). The complaint thus need not "set out in detail the facts upon which" the claim is based. *Conley*, 355 U.S. at 47, 78 S.Ct. 99.

"[T]he purpose of pleading is to facilitate a proper decision on the merits," *Conley*, 355 U.S. at 48, 78 S.Ct. 99, and not simply to screen out complaints based on a lack of artful lawyering before any facts have been discovered, *id.* "[O]rdinary pleading rules are not meant to impose a great

burden upon a plaintiff." *Dura Pharms., Inc. v. Broudo*, ---- U.S. ----, 125 S.Ct. 1627, 1634, 161 L.Ed.2d 577 (2005); *see also* Fed.R.Civ.P. 8(f) ("All pleadings shall be so construed as to do substantial justice.").

B. Heightened Pleading Standards

The Rules do establish more demanding pleading requirements for certain kinds of claims. *See, e.g.*, Fed.R.Civ.P. 9(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."). But as the language of Rule 9 makes clear, and as the Supreme Court has recently confirmed, instances requiring such particularized pleading are narrowly circumscribed by the Rules. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) ("Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions."). Antitrust actions are not among those exceptions.

In *Swierkiewicz*, the Supreme Court noted that it had previously "declined to extend" heightened pleading requirements to "other contexts" beyond "fraud or mistake." *Id.* (citing *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993)); *see also Leatherman*, 507 U.S. at 168, 113 S.Ct. 1160 (noting that while "the Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, [they] do not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983[, and] *[e]xpressio unius est exclusio alterius*"). The *Swierkiewicz* Court unanimously reaffirmed that approach with respect to the allegations of employment discrimination before it. *See Swierkiewicz*, 534 U.S. at 513, 122 S.Ct. 992 ("[C]omplaints in these cases, as in most others, must satisfy only the simple requirements of Rule 8(a)."). "A requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'" *Id.* at 515, 122 S.Ct. 992 (quoting *Leatherman*, 507

U.S. at 168, 113 S.Ct. 1160). Echoing *Conley*, the Court explained that "[t]he liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim." *Id.* at 514, 122 S.Ct. 992.

Our recent opinion in *Wynder v. McMahon*, 360 F.3d 73 (2d Cir.2004), a race discrimination case, is instructive. The district court had "impos[ed] specific conditions on the form and content of" a complaint beyond those required by Rule 8(a). *Id.* at 74. We held that to have been improper. We said:

> It is hardly debatable that the district court's order called for the plaintiff to supply a complaint that substantially exceeded the requirements of Rule 8. Under *Swierkiewicz*, Rule 8 pleading is extremely permissive. 534 U.S. at 512-13, 122 S.Ct. 992. As the Supreme Court there noted, Rule 8(a)(2) provides (a) that a complaint must include only "a short and plain statement of the claim showing that the pleader is entitled to relief," and (b) that such a statement simply "'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" 534 U.S. at 512, 122 S.Ct. 992 (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)).[3]

---

[3] Other provisions of Rule 8 are inextricably linked to Rule 8(a)'s simplified notice pleading standard. Rule 8(e)(1) states that "[n]o technical forms of pleading or motions are required," and Rule 8(f) provides that "[a]ll pleadings shall be so construed as to do substantial justice." This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims. "The provisions for discovery are so flexible and the provisions for pretrial procedure and summary judgment so effective, that attempted surprise in federal practice is aborted very easily, synthetic issues detected, and the gravamen of the dispute brought frankly into the open for the inspection of the

> In the case before us, the district court demanded far more than a short and plain statement of the claims and the grounds upon which they rest.

Id. at 77. We went on to conclude that the plaintiff's pleading, however imperfect, had satisfied the permissive standard of Rule 8, rightly understood.

> In the case before us, plaintiff's submission is a model of neither clarity nor brevity, and we can sympathize with the district court's displeasure with it, but it is sufficient to put the defendants on fair notice. In *Simmons*, we defined fair notice as "that which will enable the adverse party to answer and prepare for trial, allow the application of res judicata, and identify the nature of the case so that it may be assigned the proper form of trial." 49 F.3d at 86 (internal quotation marks omitted); *see also Salahuddin v. Cuomo*, 861 F.2d 40, 42 (2d Cir.1988) (fair notice is judged by whether the complaint enables defendants "to answer and prepare for trial"). [The plaintiff's] complaint, at its core, achieves these ends.

Id. at 79. We therefore vacated the district court's dismissal and remanded for further proceedings.

C. Heightened Pleading in Antitrust Cases

Antitrust claims are, for pleading purposes, no different. We have consistently rejected the argument – put forward by successive generations of lawyers representing clients defending against civil antitrust claims – that antitrust complaints merit a more rigorous pleading standard, whether because of their typical complexity and sometimes amorphous nature, or because of the related extraordinary burdens that litigation beyond the pleading stage may place on defendants and the courts. *See Todd*, 275 F.3d at 198 ("No heightened pleading

---

court." 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1202, p. 76 (2d ed.1990).

Wynder, 360 F.3d at 77 n. 6 (footnote in the original; renumbered).

requirements apply in antitrust cases."); *George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp.*, 554 F.2d 551, 553-54 (2d Cir.1977) (rejecting the argument that "antitrust claims, because of their complexity, must be pleaded with greater specificity than other claims," and concluding that "a short plain statement of a claim for relief which gives notice to the opposing party is all that is necessary in antitrust cases, as in other cases under the Federal Rules. . . [;] [t]he discovery process is designed to provide whatever additional sharpening of the issues may be necessary"); *Nagler v. Admiral Corp.*, 248 F.2d 319, 322-23 (2d Cir.1957) (noting that "[i]t is true that antitrust litigation may be of wide scope and without a central point of attack, so that defense must be diffuse, prolonged, and costly," and that "many defense lawyers have strongly advocated more particularized pleading in this area of litigation," but concluding that "it is quite clear that the federal rules contain no special exceptions for antitrust cases"). Indeed, it has been argued from time to time that antitrust cases are less suitable candidates for dismissal at the pleading stage than some other kinds of litigation because evidence of the claimed illegality is likely to be in the exclusive control of the defendants. *See Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 746, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976) ("[I]n antitrust cases, where 'the proof is largely in the hands of the alleged conspirators,' dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." (quoting *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962))).

True, we have said that "[a]lthough the Federal Rules permit statement of ultimate facts, a bare bones statement of conspiracy or of injury under the antitrust laws without any supporting facts permits dismissal." *Heart Disease Research Found. v. Gen. Motors Corp.*, 463 F.2d 98, 100 (2d Cir.1972); *see also Klebanow v. N.Y. Produce Exch.*, 344 F.2d 294, 299 (2d Cir.1965) ("A mere allegation that defendants violated the antitrust laws as to a particular plaintiff and commodity no

more complies with Rule 8 than an allegation which says only that a defendant made an undescribed contract with the plaintiff and breached it, or that a defendant owns a car and injured plaintiff by driving it negligently."). "[M]inimal requirements are not tantamount to nonexistent requirements." *Gooley v. Mobil Oil Corp.*, 851 F.2d 513, 514 (1st Cir.1988).

In *Klebanow*, for example, we rejected as insufficient a complaint that alleged simply that the defendants had engaged "in an illegal contract combination and conspiracy with others, unknown to the plaintiffs, to restrain and monopolize trade in, and to fix the price of, cottonseed oil," causing damages in excess of $11 million. *Klebanow*, 344 F.2d at 296 (internal quotation marks omitted). Judge Friendly, writing for the Court, noted that the complaint "furnishe[d] not the slightest clue as to what conduct by the defendants is claimed to constitute 'an illegal contract combination and conspiracy.'" *Id.* at 299.[4]

But in *United States v. Employing Plasterers' Ass'n*, 347 U.S. 186, 74 S.Ct. 452, 98 L.Ed. 618 (1954), the Supreme Court considered a complaint in a civil action brought by the federal government against a trade association, a labor union, and the union's president. Between them, the defendants were responsible for some sixty percent of the Chicago-area plastering contracting market. *Id.* at 187, 74 S.Ct. 452. The government alleged that the defendants had violated Section 1 by "act[ing] in concert to suppress competition among local plastering contractors, . . . prevent[ing] out-of-state contractors from doing any business in the Chicago area and . . . bar[ring] entry of new local contractors without approval by a private examining board set up by the union." *Id.* at 188, 74 S.Ct. 452. "The effect of all this," according to the government, was "an unlawful and unreasonable restraint of the flow in interstate commerce of materials used in the Chicago plas-

---

[4] The Court concluded, however, that it would be "improper" to dismiss the case without permitting the plaintiffs to amend their pleadings. *Klebanow*, 344 F.2d at 299-300.

tering industry." *Id.* The district court dismissed the complaint, concluding "that there was no allegation of fact which showed that these powerful local restraints had a sufficiently adverse effect on the flow of plastering materials into Illinois." *Id.*

The Supreme Court disagreed, noting that "the complaint alleged that continuously [for more than a decade] a local group of people were to a large extent able to dictate who could and who could not buy plastering materials that had to reach Illinois through interstate trade if they reached there at all." *Id.* at 189, 74 S.Ct. 452. The Court continued:

> Under such circumstances it goes too far to say that the Government could not possibly produce enough evidence to show that these local restraints caused unreasonable burdens on the free and uninterrupted flow of plastering materials into Illinois. . . .
>
> The Government's complaint may be too long and too detailed in view of the modern practice looking to simplicity and reasonable brevity in pleading. It does not charge too little. It includes every essential to show a violation of the Sherman Act. And where a bona fide complaint is filed that charges every element necessary to recover, summary dismissal of a civil case for failure to set out evidential facts can seldom be justified.

Id.

Three years later, the Court again emphasized the limited factual proffer required to satisfy the pleading requirement in a Section 1 case. It noted in *Radovich v. National Football League*, 352 U.S. 445, 77 S.Ct. 390, 1 L.Ed.2d 456 (1957), that "[t]he test as to sufficiency laid down by Mr. Justice Holmes . . . is whether 'the claim is wholly frivolous,'" *id.* at 453, 77 S.Ct. 390 (quoting *Hart v. B.F. Keith Vaudeville Exchange*, 262 U.S. 271, 274, 43 S.Ct. 540, 67 L.Ed. 977 (1923)). Although the Court acknowledged that "the complaint might have been more precise in its allegations con-

cerning the purpose and effect of the conspiracy," it concluded: "'[W]e are not prepared to say that nothing can be extracted from this bill that falls under the act of Congress.'" *Id.* (quoting *Hart*, 262 U.S. at 274, 43 S.Ct. 540).

Less than eight months later, we cautioned against extensive antitrust pleading in which unnecessary details "double the bulk without increasing enlightenment." *Nagler*, 248 F.2d at 325. Describing the plaintiffs' complaint as an "imposing document consisting of twelve or more printed pages," *id.* at 324, we said that we "must look beyond the mere mountain of words to the meaning sought to be conveyed," *id.* at 325. "So looking," we concluded, "we can have no doubt that plaintiffs say the supplier defendants have given their favored customers . . . price discounts and other special favors (listed in some detail) which have lost sales to the plaintiffs, destroyed their capacity to compete, and forced some of them out of business." *Id.* While noting that the complaint did "lack a direct allegation that the defendants conspired together," we said that "as to this the trier of facts may draw an inference of agreement or concerted action from the 'conscious parallelism' of the defendants' acts of price cutting and the like." *Id.* Accordingly, we reversed the district court's dismissal of the complaint, concluding that the complaint should not "be burdened with possibly hundreds of specific instances" of the antitrust violations alleged. *Id.* at 326. "[S]uch pleading of the evidence is surely not required and is on the whole undesirable." *Id.* "It is a matter for the discovery process, not for allegations of detail in the complaint." *Id.*

The factual predicate that is pleaded does need to include conspiracy among the realm of plausible[5] possibilities. *See*,

---

[5] One circuit court has employed this definition of "plausible" in another context: "'superficially worthy of belief: CREDIBLE.'" *Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 664 (9th Cir.2003) (quoting Webster's Third New International Dictionary 1736 (1976)). The Supreme Court in *Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), used the same term in the context of a motion for summary judgment. *See Matsushita*, 475 U.S.

e.g., *Todd*, 275 F.3d at 200 ("To survive a Rule 12(b)(6) motion to dismiss [in a Section 1 case], an alleged product market must [*inter alia*] . . . be 'plausible.'" (citing *Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81, 86 (2d Cir.2000), *cert. denied*, 534 U.S. 888, 122 S.Ct. 201, 151 L.Ed.2d 142 (2001))); *see also DM Research, Inc. v. College of American Pathologists*, 170 F.3d 53, 56 (1st Cir.1999) (affirming dismissal where, "without more detail, it is highly implausible to suppose that [one of the defendants] or its members ha[d] any reason to 'agree' with" the other defendant unlawfully); *TV Communications Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1026 (10th Cir.1992) (dismissing antitrust complaint in part on the basis of the implausibility of the conspiracy alleged); *cf. Asahi Glass Co., Ltd. v. Pentech Pharms., Inc.*, 289 F.Supp.2d 986, 995 (N.D.Ill.2003) (Posner, *J.*, sitting by designation) ("[S]ome threshold of plausibility must be crossed at the outset before a patent antitrust case should be permitted to go into its inevitably costly and protracted discovery phase."). If a pleaded conspiracy is implausible on the basis of the facts as pleaded – if the allegations amount to no more than "unlikely speculations" – the complaint will be dismissed. *DM Research*, 170 F.3d at 56. But short of the extremes of "bare bones" and "implausibility," a complaint in an antitrust case need only contain the "short and plain statement of the claim showing that the pleader is entitled to relief" that Rule 8(a) requires.

We tackled this issue in the Section 1 context in *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055 (2d Cir.1996), *vacated on other grounds*, 525 U.S. 128, 119 S.Ct. 493, 142 L.Ed.2d 510 (1998). Our analysis of the complaint under review began,

---

at 596-97, 106 S.Ct. 1348 ("[T]he absence of any plausible motive to engage in the conduct charged is highly relevant to whether a 'genuine issue for trial' exists within the meaning of Rule 56(e)."). As we note, however, language setting forth a summary judgment standard must be used with care in assessing a motion to dismiss.

> In this case, we believe that the District Court may have been misled by a poorly drafted complaint into categorizing the arrangement as one that is presumptively legal. Since the complaint may properly be understood to allege arrangements that might be shown to be unlawful, we are obliged to reverse in part and remand. We believe that the complaint states a cause of action under Section One of the Sherman Act . . . .

Id. at 1059.

We continued:

> To state a claim under Section One of the Sherman Act, [the plaintiff] must allege (1) that the NYNEX Defendants entered into a contract, combination, or conspiracy, and (2) that their agreement was in restraint of trade. *See* 15 U.S.C. § 1.

Id. And then, by way of footnote, we said:

> The NYNEX Defendants devote a single footnote in their brief to the argument that [the plaintiff] failed to allege a "conspiracy" in restraint of trade. Although [the plaintiff's] complaint is not a model of clarity, it alleges that NYNEX, MECo, and AT & T Technologies conspired to defraud the rate-paying public and that this agreement apparently contemplated some form of discrimination against [the plaintiff]. More specifically, the complaint alleges the existence of various meetings between NYNEX procurement personnel, MECo officers, and agents of AT & T Technologies. These allegations are sufficient to defeat a motion to dismiss.

Id., n. 3 (citation omitted). The Supreme Court reversed, *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 119 S.Ct. 493, 142 L.Ed.2d 510 (1998), but on the grounds that the legal theory underlying the asserted cause of action was incorrect, not

that the factual allegations contained in the complaint were otherwise insufficient.[6]

While these decisions do not offer a bright-line rule for identifying the factual allegations required to state an antitrust claim, they suggest that the burden is relatively modest. The requirements of Rule 8 "notice pleading" as applied to claims under Section 1 of the Sherman Act remain relatively straightforward. Section 1 proscribes "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign

---

[6] The notion that a properly pleaded Section 1 claim must fall somewhere on the spectrum between providing more than not "furnish[ing] the slightest clue" as to what the defendants did wrong, *Klebanow*, 344 F.2d at 299, and offering "hundreds of specific instances" of malfeasance, *Nagler*, 248 F.2d at 326, comports with the law of our sister circuits, *see, e.g., S. Austin Coalition Cmty. Council v. SBC Communications Inc.*, 274 F.3d 1168, 1171 (7th Cir.2001) ("As long as Rule 8 stands unaltered, and there is no antitrust parallel to the Private Securities Litigation Reform Act, courts must follow the norm that a complaint is sufficient if any state of the world consistent with the complaint *could* support relief." (emphasis in original)), *cert. denied*, 537 U.S. 814, 123 S.Ct. 81, 154 L.Ed.2d 18 (2002); *DM Research, Inc.*, 170 F.3d at 55, 56 (noting that a Section 1 complaint "need not include evidentiary detail," but that "the discovery process is not available where, at the complaint stage, a plaintiff has nothing more than unlikely speculations"); *Estate Constr. Co. v. Miller & Smith Holding Co., Inc.*, 14 F.3d 213, 221 (4th Cir.1994) ("[I]n order to adequately allege an antitrust conspiracy, the pleader must provide, *whenever possible, some* details of the time, place and alleged effect of the conspiracy; it is not enough merely to state that a conspiracy has taken place." (citations and internal quotation marks omitted, emphasis added)); *Mun. Utils. Bd. v. Ala. Power Co.*, 934 F.2d 1493, 1501 (11th Cir.1991) ("A plaintiff must plead sufficient facts so that each element of the alleged antitrust violation can be identified. . . . However, the alleged facts need not be spelled out with exactitude." (citation and internal quotation marks omitted)); *Pennsylvania ex rel. Zimmerman v. PepsiCo, Inc.*, 836 F.2d 173, 182 (3d Cir.1988) ("'Although detail is unnecessary, the plaintiffs must plead the facts constituting the conspiracy, its object and accomplishment[, such as] . . . the date of the alleged conspiracy [or] its attendant circumstances . . . [or] who made [incriminating] statements, where, when or to whom.'") (quoting *Black & Yates v. Mahogany Ass'n*, 129 F.2d 227, 231-32 (3d Cir.1941)).

nations." 15 U.S.C. § 1. Interpreting this prohibition, the Supreme Court "has long recognized that Congress intended to outlaw only unreasonable restraints." *State Oil Co. v. Khan*, 522 U.S. 3, 10, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997).[7] As a general matter, then, a Section 1 plaintiff must allege that (1) the defendants were involved in a contract, combination, or conspiracy that (2) operated unreasonably to restrain interstate trade, together with the factual predicate upon which those assertions are made. *See Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 95-96 (2d Cir.1998); *Discon, Inc.*, 93 F.3d at 1059.[8]

III. "Plus Factors" at the Pleading Stage

A. On Summary Judgment

A plaintiff's claim, under the ordinarily applicable standard, will not survive a defendant's motion for summary judgment – a stage that this litigation has, of course, yet to

---

[7] Conduct can be deemed unreasonable in two ways. Certain conduct is considered *per se* unreasonable because it has "such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit." *State Oil Co.*, 522 U.S. at 10, 118 S.Ct. 275. In most cases, however, conduct must be evaluated under a "rule of reason" standard, "according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." *Id.*

[8] These requirements generally accord with those of courts in other Circuits, though some courts have chosen to divide the inquiry into three prongs, rather than two. *See, e.g., Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1062 (9th Cir.2001); *Armstrong Surgical Ctr., Inc. v. Armstrong County Mem'l Hosp.*, 185 F.3d 154, 157 (3d Cir.1999), *cert. denied*, 530 U.S. 1261, 120 S.Ct. 2716, 147 L.Ed.2d 982 (2000); *Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1158 (5th Cir.1992), *cert. denied sub nom. Dillard v. Sec. Pacific Corp.*, 506 U.S. 1079, 113 S.Ct. 1046, 122 L.Ed.2d 355 (1993); *In re Carbon Black Antitrust Litig.*, No. Civ. A. 03-10191-DPW, MDL No. 1543, 2005 WL 102966, at *5, 2005 U.S. Dist LEXIS 660, at *29 (D.Mass. Jan.18, 2005) [hereinafter "*Carbon Black*"].

reach – "[w]here the record taken as a whole could not lead a rational trier of fact to find for the [plaintiff on that claim]." *Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). In making this determination, all "'inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the [plaintiff].'" *Id.* (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962) (per curiam)) (alteration in original). In a case brought under Section 1 of the Sherman Act, however, "the range of permissible inferences from ambiguous evidence" is limited, *id.* at 588, 106 S.Ct. 1348, because antitrust laws prohibit only contracts, combinations, or conspiracies – and not independent parallel conduct – that operate unreasonably to restrain trade, *see Apex Oil*, 822 F.2d at 253. Although "[p]arallel conduct can be probative evidence bearing on the issue of whether there is an antitrust conspiracy," *id.*, it may also, as the district court in the instant case pointed out, "simply [be] the result of similar decisions by competitors who have the same information and the same basic economic interests," *Twombly*, 313 F.Supp.2d at 181. Accordingly, in a Section 1 case where there is no "direct, 'smoking gun' evidence," *Todd*, 275 F.3d at 198,

> conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To survive *a motion for summary judgment or for a directed verdict*, a plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently.

Matsushita, 475 U.S. at 588, 106 S.Ct. 1348 (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984) (citations omitted, emphasis added)). Thus, on a motion for summary judgment in a case involving alleged violations of Section 1, "courts have held that a plaintiff must show the existence of additional cir-

cumstances, often referred to as 'plus' factors, which, when viewed in conjunction with the parallel acts, can serve to allow a fact-finder to infer a conspiracy." *Apex Oil*, 822 F.2d at 253. These "plus factors" may include: "a common motive to conspire," *id.* at 254, evidence that "shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators," *id.* (citation and internal quotation marks omitted), and evidence of "a high level of interfirm communications," *id.*; *accord Todd*, 275 F.3d at 198.

B. On Motion to Dismiss.

We are reviewing the grant of a motion to dismiss, not the grant of a motion for summary judgment, however. To survive a motion to dismiss, as we have explained, an antitrust claimant must allege only the existence of a conspiracy and a sufficient supporting factual predicate on which that allegation is based.

As discussed in part II.C. of this opinion, the pleaded factual predicate must include conspiracy among the realm of "plausible" possibilities in order to survive a motion to dismiss. *Nagler* suggests that a pleading of facts indicating parallel conduct by the defendants can suffice to state a plausible claim of conspiracy. *Nagler*, 248 F.2d at 325. Thus, to rule that allegations of parallel anticompetitive conduct fail to support a plausible conspiracy claim, a court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence. Of course, if a plaintiff can plead facts in addition to parallelism to support an inference of collusion – what we have referred to above as "plus factors" at the summary judgment stage – that only strengthens the plausibility of the conspiracy pleading. But plus factors are not *required* to be pleaded to permit an antitrust claim based on parallel conduct to survive dismissal. Of course, as we have explained in the previous section of this opinion, *after* discovery, a plaintiff confronting a summary judgment motion is required to adduce admissible evidence of

"plus factors" if it seeks to have the trier of fact infer an unlawful conspiracy in restraint of trade from consciously parallel conduct.

We cannot know at the pleading stage whether the plaintiffs here will seek to rely on such an inference from parallelism based on "plus factors" or not. But there is no reason we can perceive to require the plaintiffs to include allegations of "plus factors" in their complaint, since they may not be required to establish "plus factors" at trial – if, for example, they can prove conspiracy directly.[9]

---

[9] The plaintiffs point to the holdings of various district courts that have recently reached similar conclusions. *See In re Tableware Antitrust Litig.*, 363 F.Supp.2d 1203, 1206 (N.D.Cal.2005) (noting that "[i]n considering whether a complaint provides insufficient factual support for a legally viable theory of relief, a useful thought experiment is to ask 'what [the] plaintiff [could] plead in an amended complaint to repair the defect,'" and rejecting the proposition that Rule 8 requires allegations of "'when [the conspiracy] conversations took place, how many occurred, who participated, where the conversations took place, [and] what topics were discussed' as well as . . . 'meeting dates,' 'meeting places' and [names of] 'individuals employed by . . . [d]efendants who allegedly participated'"); *Carbon Black*, 2005 WL 102966, at *7 n. 7, 2005 U.S. Dist LEXIS 660, at *35 n. 7 (noting that where the question is "[h]ow much evidence of an illegal agreement must antitrust plaintiffs plead to avoid dismissal for failure to state a claim . . . [t]he answer is certainly some quantum less than will be required at later stages" of the litigation (citation and internal quotation marks omitted, first alteration in original)); *In re Pressure Sensitive Labelstock Antitrust Litig.*, 356 F.Supp.2d 484, 492 (M.D.Pa.2005) (noting that "a plaintiff 'need *not* allege the existence of . . . plus factors in order to plead an antitrust cause of action'" (quoting *Lum v. Bank of Am.*, 361 F.3d 217, 230 (3d Cir.2004) and adding emphasis)); *N. Jackson Pharmacy, Inc. v. Express Scripts, Inc.*, 345 F.Supp.2d 1279, 1286 (N.D.Ala.2004) (noting that "'plus factor' allegations serve to substantiate a plaintiff's conspiracy allegation; their purpose is not to clarify an otherwise incomprehensible claim," and that "[j]ust as an employment-discrimination plaintiff need not allege 'circumstances that support an inference of discrimination,' there is no need for an antitrust plaintiff to allege a 'plus factor [which] generates an inference of illegal price fixing.'" (citations omitted, second alteration in original)).

We acknowledge that district courts have occasionally elided the distinction between the standard applicable to Rule 12(b)(6) and Rule 56 motions on the basis of a well-founded concern that to do otherwise would be to condemn defendants to potentially limitless "fishing expeditions"[10] – discovery pursued just "in case anything turn[s] up"[11] – in hopes, perhaps, of a favorable settlement in any event. In several recent cases, including this one, district courts have dismissed Sherman Act complaints because they did not contain substantial allegations of facts beyond "conscious parallelism" sufficient to support an inference that the defendants' actions were more likely than not conspiratorial. *See Twombly*, 313 F.Supp.2d at 180 ("In the context of parallel conduct allegations, simply stating that defendants engaged in parallel conduct, and that this parallelism must have been due to an agreement, would be equivalent to a conclusory, 'bare bones' allegation of conspiracy."); *see also Kramer v. Pollock-Krasner Found.*, 890 F.Supp. 250, 256 (S.D.N.Y.1995) (dismissing a Sherman Act claim "for failure to allege a sufficient factual basis," because "the defendants' allegedly conspiratorial actions could equally have been prompted by lawful, independent goals which do not constitute a conspiracy"); *Yellow Page Solutions, Inc. v. Bell Atl. Yellow Pages Co.*, No. 00 CIV. 5663, 2001 WL 1468168, at *14, 2001 U.S. Dist. LEXIS 18831, at *42 (S.D.N.Y. Nov.19, 2001) (dismissing a

---

[10] *But cf. Hickman v. Taylor*, 329 U.S. 495, 507, 67 S.Ct. 385, 91 L.Ed. 451 (1947) ("[T]he deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case.").

[11] Charles Dickens, *David Copperfield* 159 (Jeremy Tambling ed., Penguin Books 1996) (1850). *Cf. Weinstock v. Columbia Univ.*, 224 F.3d 33, 49-50 (2d Cir.2000) ("Plaintiff would have us follow the advice of David Copperfield's mentor, the amicable Mr. Micawber, and let matters proceed in the hope that 'something will turn up.' This notion is inconsistent with the text and policy behind Rule 56 of the Federal Rules of Civil Procedure, which was intended to prevent such calendar profligacy." (citation omitted)).

Sherman Act complaint for failure to state a claim because "uniformity does not permit an inference of a conspiracy where the conduct is in each party's individual self-interest"). *But cf. Levitch v. Columbia Broad. Sys., Inc.*, 495 F.Supp. 649, 675 (S.D.N.Y.1980) (dismissing a Sherman Act claim because "in order to state a valid claim under § 1, a plaintiff must, at a minimum, allege how [the defendants'] decisions are interdependent by at least suggesting that there is some reason to believe that the defendants were committed to a common end"), *aff'd*, 697 F.2d 495 (2d Cir.1983). As the district court in the instant case accurately stated: "While the Second Circuit's case law on parallel conduct conspiracies has developed mainly in the context of summary judgment, district courts have required that plaintiffs allege plus factors in order to withstand motions to dismiss as well." *Twombly*, 313 F.Supp.2d at 179-80.

The district court viewed the requirement that Section 1 plaintiffs plead "plus factors" as sensible because antitrust laws do not prohibit parallel conduct and because "the defendants [need] notice of plaintiff[s'] theory of the conspiracy." *Id.* at 181. To these considerations, the defendants add a third on appeal: the fear that, unless antitrust plaintiffs are required to plead "plus factors," "*any* claim asserting parallel conduct [will] survive a motion to dismiss." Appellees' Br. at 29. Without a heightened pleading requirement, the defendants predict, "[a]ntitrust cases [will] clog the courts for years, cost defendants millions of dollars to defend, and . . . threaten to reward plaintiffs' attorneys for bringing meritless claims." *Id.* at 29-30.

We are not unsympathetic to these concerns, but we find the arguments based on them ultimately unconvincing. At the pleading stage, we are concerned only with whether the defendants have "fair notice" of the claim, and the conspiracy that is alleged as part of the claim, against them – that is, enough to "enable [the defendants] to[, *inter alia*,] answer and prepare for trial," *Simmons*, 49 F.3d at 86 – not with whether the conspiracy can be established at trial.

The *Nagler* Court admonished that while an antitrust defense will often prove "diffuse, prolonged, and costly," *Nagler*, 248 F.2d at 322, the remedy to that problem is not to be found in abandoning the rules of notice pleading and raising the bar on plaintiffs in the absence of a legislative mandate to do so. "[A] considerable part of federal litigation is of a lengthy and burdensome nature and we are not justified in frowning on a Congressional policy so definitely cherished as is [that expressed by 15 U.S.C. § 1]." *Id.* at 326. Thus, in a regime that contemplates the enforcement of antitrust laws in large measure by private litigants, although litigation to summary judgment and beyond may place substantial financial and other burdens on the defendants, neither the Federal Rules nor the Supreme Court has placed on plaintiffs the requirement that they plead with special particularity the details of the conspiracies whose existence they allege. *Cf. Radovich*, 352 U.S. at 453-54, 77 S.Ct. 390 (noting that Congress "has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party," and that "[i]n the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws").[12]

---

[12] The Federal Rules are not blind to the financial and other strains that meritless complaints place on defendants and on the judiciary. *See, e.g.*, Fed.R.Civ.P. 1 ("These rules . . . shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."). The Rules provide a variety of mechanisms for alleviating these burdens, *see, e.g.*, Fed.R.Civ.P. 11(c) (providing sanctions against parties for making frivolous or baseless claims, or claims brought for an improper purpose), including provisions for ridding the courts and defendants of clearly non-meritorious litigation before discovery, *see, e.g.*, Fed.R.Civ.P. 12(b)(6) (permitting dismissal for "failure to state a claim upon which relief can be granted"); Fed.R.Civ.P. 12(c) (permitting judgment on the pleadings). The Rules also provide "pretrial procedures . . . to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues," as well as to do away with non-meritorious claims as the litigation progresses. *Conley*, 355 U.S. at 48 & n. 9, 78 S.Ct. 99.

We are mindful that a balance is being struck here, that on one side of that balance is the sometimes colossal expense of undergoing discovery, that such costs themselves likely lead defendants to pay plaintiffs to settle what would ultimately be shown to be meritless claims, that the success of such meritless claims encourages others to be brought, and that the overall result may well be a burden on the courts and a deleterious effect on the manner in which and efficiency with which business is conducted. If that balance is to be re-calibrated, however, it is Congress or the Supreme Court that must do so.[13] *See Swierkiewicz*, 534 U.S. at 515, 122 S.Ct. 992 ("A requirement of greater specificity for particular claims is a result that must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." (internal quotation marks and citation omitted)).

IV. Applying the Notice Pleading Standard to This Appeal

Accepting as true the facts alleged in the amended complaint, which are described at some length in the Background section of this opinion, above, and drawing all inferences in favor of the plaintiffs, we conclude that the plaintiffs have satisfied their burden at the pleading stage.

As the district court pointed out, to support their single claim of a conspiracy under Section 1 of the Sherman Act, the plaintiffs allege an agreement to employ two anticompetitive tactics to maintain their respective monopoly control over discrete geographic markets. *Twombly*, 313 F.Supp.2d at 182. Pursuant to the first tactic, the defendants allegedly conspired "to collectively keep CLECs from successfully entering [the defendants' respective] markets." *Id.* Pursuant to the other,

---

[13] Congress has, for example, attempted to do just that with respect to securities litigation. *See* Private Securities Litigation Reform Act of 1995, 15 U.S.C. §§ 77z-1-2, 78j-1, 78u-4-5 (1997 & Supp.2003); Securities Litigation Uniform Standards Act of 1998, Pub.L. No. 105-353, 112 Stat. 3227 (amending scattered provisions of 15 U.S.C., including 15 U.S.C. §§ 77p, 77v, 78bb).

they allegedly agreed "to refrain from attempting to enter each other's markets as CLECs." *Id.*

The amended complaint alleges that the conspiracy began on February 6, 1996, around the time the Telecommunications Act became law, and has continued to the present day. Am. Compl. ¶ 64. It further alleges that the defendants together control more than ninety percent of the market for local telephone service in the continental United States, *id.* ¶ 48, and that they, together with other, unnamed "persons, firms, corporations and associations," engaged in the conspiracy, *id.* ¶ 16. While the amended complaint does not identify specific instances of conspiratorial conduct or communications, it does set forth the temporal and geographic parameters of the alleged illegal activity and the identities of the alleged key participants. It further alleges that the conduct was undertaken specifically to preserve historic monopoly conditions, and to thwart the pro-competitive purposes of the Telecommunications Act, *id.* ¶¶ 25-34, 47, a claim that, if true, would doubtless constitute an unreasonable restraint of trade. And it specifically alleges an effect on interstate commerce, noting that the defendants provide local telephone and high-speed Internet services "across state lines," that they "regularly and frequently solicited customers and sent bills and received payments via the mail throughout the United States," and that the "marketing, sale and provision of local telephone and/or high speed Internet services regularly occurs in and substantially affects interstate trade and commerce." *Id.* ¶ 52.

With respect to the allegation that the defendants conspired not to invade each other's territory, the amended complaint asserts that most of the defendants are dominant in particular geographic areas that surround small pieces of territory controlled by other defendants, yet none has attempted to compete meaningfully in the surrounded territories. Am. Compl. ¶¶ 40-41. The amended complaint further alleges that the ILECs have conceded that competing as CLECs would be inherently profitable, because they have complained that the Telecommunications Act requires them to charge CLECs be-

low-cost rates for network access. *Id.* ¶ 39. In addition, the amended complaint points to the alleged admission by defendant Qwest's CEO that such competition "might be a good way to turn a quick dollar but that doesn't make it right," even though Qwest was losing considerable amounts of money at the time the statement was made. *Id.* ¶¶ 42-44.[14]

The factual allegations in support of the alleged conspiracy to keep CLECs from entering the ILECs' respective territories are that the ILECs have engaged in a variety of activities, such as interfering with the CLECs' customer relationships by continuing to bill customers who switched to the CLECs' services, denying the CLECs access to essential network equipment and facilities, and providing erroneous and confusing bills to the CLECs for their services, all designed to drive the CLECs out of business. *Id.* ¶ 47. According to the amended complaint, the defendants have frequent opportunities to organize and conduct their conspiracy through industry organizations, *id.* ¶ 46, and a common incentive to do so, because were even one ILEC to decline to participate, a successful CLEC in its territory would be better positioned to compete against other ILECs and would demonstrate that CLECs could succeed in the absence of anti-competitive conduct, *id.* ¶ 50.[15]

---

[14] The complaint also relies on a report by the CFA in support of the proposition that the defendants have "avoid[ed] head-to-head competition like the plague." Am. Compl. ¶ 47 (quoting CFA, *Lessons From 1996 Telecommunications Act: Deregulation Before Meaningful Competition Spells Consumer Disaster* 1 (Feb.2001) (citation and internal quotation marks omitted)). And it cites a letter from two members of the House of Representatives to the Attorney General requesting an investigation into alleged antitrust violations by the Baby Bells. *Id.* ¶ 45 (citing Letter from Rep. John Conyers Jr. and Rep. Zoe Lofgren to Attorney General John D. Ashcroft (Dec. 18, 2002)). These documents, however, even if they are ultimately deemed to constitute admissible evidence, are irrelevant at the pleading stage. An allegation that someone has made a similar allegation does not, without more, add anything to the complaint's allegations of fact.

[15] The fact that the defendants have engaged in parallel conduct against their self-interest has been recognized as a "plus factor" that, if proved at

We conclude that these allegations[16] are sufficient to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests," *Conley*, 355 U.S. at 47, 78 S.Ct. 99, and to "enable [the defendants] to answer and prepare for trial," *Simmons*, 49 F.3d at 86. Under the principles we have described and our decision in *Discon, Inc. v. NYNEX Corp.*, *supra*, these allegations are enough successfully to withstand a motion to dismiss.

Whether the plaintiffs will be able to prevail in response to a motion for summary judgment after discovery or at trial is, of course, an entirely different matter. We have and express no view as to the merits of the plaintiffs' underlying claims and mean to imply none. Indeed, our analysis of the arguments made on appeal, which we have stated at some length, convinces us that it is premature to arrive at any such view. But even if "it . . . [were to] appear [to us] on the face of the pleadings that a recovery is very remote and unlikely . . . that is not the test" on a motion to dismiss, *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), and would not warrant an affirmance here.

---

trial, can support the inference of collusion necessary for a jury finding of conspiracy. *Apex Oil*, 822 F.2d at 254. Thus, while plaintiffs pursuing section 1 actions are not required to plead "plus factors" to state a claim of conspiracy based on parallel anticompetitive conduct, the fact that the plaintiffs appear to be able to do so here makes it particularly difficult to conclude that the allegations contained in the complaint are insufficient to state a claim.

[16] The amended complaint again cites the CFA report, this time for the proposition that the defendants' actions against CLECs may be coordinated. *Id.* ¶ 47. As we concluded, *supra* note 14, the CFA report consists of mere allegations, and thus does not provide factual support for the claims in the amended complaint.

CONCLUSION

For the foregoing reasons, we vacate the judgment of the district court and remand the case to the court for further proceedings.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 02 Civ. 10220 (GEL)

WILLIAM TWOMBLY AND LAWRENCE MARCUS,
INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

BELL ATLANTIC CORP., BELLSOUTH CORP.,
QWEST COMMUNICATIONS INT'L, INC.,
SBC COMMUNICATIONS INC., AND
VERIZON COMMUNICATIONS INC.,
Defendants.

[Filed Oct. 8, 2003]

OPINION AND ORDER

LYNCH, District Judge.

Plaintiffs William Twombly and Lawrence Marcus bring this putative class action on behalf of themselves and all other individuals who purchased local telephone or high speed internet services in the continental United States between February 8, 1996, and the present. They allege that defendants Verizon Communications, Inc. ("Verizon"), BellSouth Corporation ("BellSouth"), Qwest Communications International, Inc. ("Qwest"), and SBC Communications, Inc. ("SBC"), (collectively, "defendants"), conspired to prevent competitive entry into their respective local telephone and internet services markets, in violation of section 1 of the Sherman Act, 15 U.S.C. § 1. Defendants now move to dismiss plaintiffs' Amended Complaint, pursuant to Fed.R.Civ.P. 12(b)(6), for

failure to state a claim on which relief can be granted. For the reasons discussed below, defendants' motion will be granted.

BACKGROUND

The following facts are taken from the Amended Complaint, except where noted. All factual allegations in the Amended Complaint are assumed to be true for purposes of this motion.

Defendants Verizon, BellSouth, Qwest, and SBC together control over ninety percent of the market for local telephone and high-speed internet services in the continental United States. (Am.Compl.¶ 21.) They are the descendants of American Telephone and Telegraph Company ("AT & T"), and its wholly owned subsidiaries, the Bell Operating Companies ("BOCs") which in 1934 owned 80 percent of all local telephone lines and services in the country. (*Id.* ¶ 17.) While the provision of local telephone service was initially competitive, the inconvenience of navigating multiple, unconnected telephone networks led "to the establishment of telephone as a monopoly service" and to AT & T's dominance. H.R.Rep. No. 104-204(I) (1995), *reprinted in* 1996 USCCAN 10, 50.

In 1974, the United States filed suit against AT & T, alleging that it had violated the Sherman Act by using its control of local exchange facilities to suppress competition in related markets. (*Id.* ¶ 19.) Eight years later, the parties settled the case by entering into a consent decree, which the District Court memorialized by signing the Modified Final Judgment ("MFJ"), thereby creating the industry structure that persists today. (*Id.* ¶ 20.) In 1984, pursuant to the MFJ, AT & T divested itself of the seven regional Bell Operating Companies and exited from the local telephone market. (*Id.* ¶ 21.) The BOCs were given monopoly power over local telephone services in their respective regions, but were restricted from competing in the long distance market, and were required to provide exchange access to all interexchange (long-distance) carriers, such as Sprint and MCI. (*Id.* ¶ 20.) *See United States v. AT & T*, 552 F.Supp. 131 (D.D.C.1982).

The structure created by the MFJ allowed the seven BOCs exclusive control over their respective regions. This did not change even as the original seven merged into larger companies controlling larger regions, resulting in the four companies named as defendants controlling the local telephone markets for ninety percent of the continental United States. (Am.Compl.Ex. A.) Thus, since 1982, the local phone service market has consisted of "state-sanctioned local monopolies." *Law Offices of Curtis V. Trinko L.L.P. v. Bell Atlantic Corp.*, 305 F.3d 89, 93 (2d Cir.2002), *cert. granted, Verizon Comms., Inc. v. Law Offices of Curtis V. Trinko L.L.P.*, 538 U.S. 905, 123 S.Ct. 1480, 155 L.Ed.2d 224 (2003). (*See also* Am. Compl. ¶ 23.) While the business activities of these monopolies were heavily regulated by state and federal agencies, they were also "frequently protected from competition by government barriers to entry[, as] the majority of States restrict[ed] full and fair competition in the local exchange, either by statute or through the public utility commission's regulations." H.R.Rep. No. 104-204(I), 1996 USCCAN at 49. Thus, as plaintiffs allege, "[l]ocal exchange carriers historically operated in their local franchise areas free of competition, pursuant to exclusive franchises granted by state regulatory agencies." (Am.Compl.¶ 23.)

The Telecommunications Act of 1996, Pub.L. No. 104, 110 Stat. 56 (the "Act"), is designed to replace the heavy regulation in the local telephone markets with competition. H.R.Rep. No. 104-204(I), 1996 USCCAN at 50. It "opens the markets for both local telephone and long-distance services to effective competition." (Am.Compl.¶ 26.) Specifically, the Act requires incumbent local exchange carriers ("ILECs"), such as the defendants, to facilitate competitors' entry into their local telephone markets, in return for the opportunity to compete in the long-distance market. (*Id.* ¶ 30.) Because building their own telecommunications infrastructure would be prohibitively expensive for most competing local exchange carriers ("CLECs"), the Act provides CLECs with a shortcut

into the market by obligating ILECs to sell access to elements of their networks at wholesale rates. 47 U.S.C. § 251.

A CLEC may "obtain access to an incumbent's network in [one of] three ways: It can purchase local telephone services at wholesale rates for resale to end users; it can lease elements of the incumbent's network on an unbundled basis; and it can interconnect its own [network] with the incumbent's network" and infrastructure. *AT & T v. Iowa Utils. Bd.*, 525 U.S. 366, 371-72, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999) (citing 47 U.S.C. § 251); *Trinko*, 305 F.3d at 94 (describing operation of § 251). (*See* Am. Compl. ¶ 32.) A CLEC's business is therefore founded on its relationship with the ILEC. This relationship is itself regulated by the duties that the Act places on ILECs, but the parties may opt out of the Act's provisions by negotiating an interconnection agreement and having it approved by a state commission. 47 U.S.C. § 252. The interconnection agreement, rather than § 251, then governs the relationship between the parties, and disputes arising thereunder may be arbitrated by the state commission. *Trinko*, 305 F.3d at 102-03.

Plaintiffs allege that, despite the Act's mandate that the ILECs provide access to their telecommunications infrastructure on "just, reasonable and non-discriminatory terms," (Am.Compl.¶¶ 27-28), the defendants have made it nearly impossible for CLECs to enter their local service markets. According to plaintiffs, defendants have refused to provide potential CLECs with network connections and services of equal quality to those they provide to their retail customers, billed CLEC customers in order to ruin CLECs' customer relations, delayed in providing network elements, refused CLECs the use of certain facilities, and generally used their "monopoly power and exclusive control over essential facilities" to negotiate unfair agreements with would-be CLECs. (*Id.* ¶ 47.) The complaint alleges that these actions were taken not simply on behalf of each individual defendant within its local territory, but pursuant to an agreement among all defendants to collectively thwart the efforts of competing

companies. (*Id.* ¶ 50.) Plaintiffs assert that this anti-competitive behavior has been quite successful, citing Congressman John Conyers's 2001 statement that potential CLECs "invested tens of billions of dollars . . . today, most of those companies have been devastated by the anti-competitive behavior and procrastination of the Bell monopolies." (Pls. Mem. at 2; Buchman Aff. Ex. B; *see also* Am. Compl. ¶ 47.)

Plaintiffs also allege that defendants have engaged in parallel conduct by not competing as CLECs in each others' respective territories, "which would be anomalous in the absence of an agreement among the [defendants] not to compete with one another." (Am.Compl.¶¶ 40-41.) Because the territories serviced by defendants are, in part, non-contiguous, sometimes looping around and surrounding each other (*see id.* Ex. B), defendants' collective failure to move into adjacent local phone service markets is, plaintiffs assert, highly suspicious. In addition, Qwest's CEO, Richard Notebaert, has made statements that could suggest that becoming CLECs in other markets would have been in defendants' economic interests, absent an agreement not to compete. (*Id.* ¶ 42.)

Defendants' alleged motives for conspiring, both to keep out CLECs in general, and to refrain from entering each others' territories, was to maintain their exclusive control over their respective territories, and to prevent any CLECs from succeeding, or discovering that it would be possible to succeed, in defendants' markets. (*Id.* ¶ 50.) As a result of the conspiracy, plaintiffs have been deprived of the opportunity to purchase local telephone and high-speed internet services from a CLEC rather than an ILEC, and have been forced to pay the supracompetitive rates of ILECs rather than the presumably lower rates that competition would have fostered. (*Id.* ¶ 66.)

Defendants now move to dismiss the Amended Complaint, asserting that plaintiffs have not alleged sufficient facts from which a conspiracy to violate the Sherman Act can be inferred, and that plaintiffs' claims for treble damages are

barred by the filed rate doctrine. (Defs. Mem. at 1-3.) Defendant BellSouth also moves to dismiss the suit as against it, for lack of personal jurisdiction. (BellSouth Mot. at 1.)

DISCUSSION

On a motion to dismiss under Fed.R.Civ.P. 12(b)(6), the Court must accept "as true the facts alleged in the complaint," *Jackson Nat'l Life Ins. Co. v. Merrill Lynch & Co., Inc.*, 32 F.3d 697, 699-700 (2d Cir.1994), and may grant the motion only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Thomas v. City of New York*, 143 F.3d 31, 36 (2d Cir.1998) (citations omitted); *see also Bernheim v. Litt*, 79 F.3d 318, 321 (2d Cir.1996) (stating that when adjudicating motion to dismiss under Fed.R.Civ.P. 12(b)(6), the "issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims" (internal quotation marks and citations omitted)). When deciding such a motion, the Court may consider documents attached to the complaint as exhibits or incorporated in it by reference, and such facts as are suitable for judicial notice pursuant to Fed.R.Evid. 201. *Kramer v. Time Warner Inc.*, 937 F.2d 767, 773 (2d Cir.1991). All reasonable inferences are to be drawn in the plaintiffs' favor, which often makes it "difficult to resolve [certain questions] as a matter of law." *In re Independent Energy Holdings PLC*, 154 F.Supp.2d 741, 748 (S.D.N.Y.2001).

1. *The Pleading Standard*

Section 1 of the Sherman Act prohibits "every contract, combination . . . or conspiracy in restraint of trade or commerce." 15 U.S.C. § 1. Thus, absent an agreement among competitors to restrain trade, anti-competitive behavior does not violate § 1. *Modern Home Inst., Inc. v. Hartford Accident & Indemnity Co.*, 513 F.2d 102, 108-09 (2d Cir.1975) ("Fundamental then to any § 1 claim is the finding of an agreement, express or otherwise, between two or more persons."). Direct evidence of such an agreement is often impossible to obtain,

however, and so an illegal agreement must often be inferred from circumstantial evidence, including the public conduct and "business behavior" of competitors, as well as market facts. *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540, 74 S.Ct. 257, 98 L.Ed. 273 (1954). Instances in which competing firms embark upon similar courses of conduct may suggest that the firms have agreed to manipulate the market in some way. However, the Supreme Court "has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense." *Id.* at 541, 74 S.Ct. 257. Thus, while plaintiffs may allege a conspiracy by citing instances of parallel business behavior that suggest an agreement, courts must be cognizant of the fact that, while "[c]ircumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy[, . . .] 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely." *Id.*

Moreover, parallel action is a common and often legitimate phenomenon, because similar market actors with similar information and economic interests will often reach the same business decisions. Courts must therefore distinguish between conduct that represents the natural convergence of competitors' market behavior, and conduct that appears to have been taken pursuant to an agreement. In the summary judgment context, the Second Circuit requires plaintiffs to present evidence suggesting that the defendants' parallel conduct has resulted from an agreement rather than "merely from independent . . . conduct by firms acting in their own self-interests." *Kramer v. Pollock-Krasner Found.*, 890 F.Supp. 250, 255 (S.D.N.Y.1995) (citing *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 254 (2d Cir.1987)). Plaintiffs may satisfy this standard by establishing at least one "plus factor" that tends to exclude independent self-interested conduct as an explanation for defendants' parallel behavior. The plus factors include evidence that the parallel behavior would have been against

individual defendants' economic interests absent an agreement, or that defendants possessed a strong common motive to conspire. *Apex Oil*, 822 F.2d at 253-54.

While the Second Circuit's case law on parallel conduct conspiracies has developed mainly in the context of summary judgment, district courts have required that plaintiffs allege plus factors in order to withstand motions to dismiss as well. *See, e.g., Kramer*, 890 F.Supp. at 255-56; *Levitch v. Columbia Broadcasting System, Inc.*, 495 F.Supp. 649, 675 (S.D.N.Y. 1980) (stating that "the vast majority of courts which have considered the question" have held that plaintiffs must allege facts suggesting the interdependence of the parallel conduct in order to state a claim). This requirement is necessary to ensure that plaintiffs actually state a claim on which relief can be granted, by separating complaints that allege simple parallel action that does not suggest a conspiracy and is therefore not actionable under § 1, from complaints that allege parallel action that could be the result of a conspiracy, and that plaintiffs are therefore entitled to explore in discovery.

The plus factors pleading requirement is also an expression of the longstanding rule that "a bare bones statement of conspiracy or of injury under the antitrust laws without any supporting facts permits dismissal" of a complaint. *Heart Disease Res. Found. v. General Motors Corp.*, 463 F.2d 98, 100 (2d Cir.1972). While there is no special pleading standard for conspiracy, simply alleging that two or more defendants participated in a "conspiracy," without more, is insufficient to withstand a motion to dismiss. *Yellow Page Solutions, Inc. v. Bell Atlantic Yellow Pages Co.*, No. 00 Civ. 5663(MBM), 2001 WL 1468168, at *9 (S.D.N.Y. Nov.19, 2001). Thus, plaintiffs must always assert facts that, if true, support the existence of a conspiracy, such as motivation or conduct that lends itself to an inference of an agreement. In the context of parallel conduct allegations, simply stating that defendants engaged in parallel conduct, and that this parallelism must have been due to an agreement, would be equivalent to a conclusory, "bare bones" allegation of conspiracy. *Id.* Viewed in

this light, the plus factors are simply examples of allegations that are sufficiently suggestive of a conspiracy to warrant discovery.

The requirement that plaintiffs allege specific facts suggesting a conspiracy is somewhat in tension with Fed.R.Civ.P. 8, which requires only a "short and plain statement of the claim," and allows plaintiffs to base their complaints on "statement[s] of ultimate facts," *Heart Disease Res. Found.*, 463 F.2d at 100. Indeed, plaintiffs argue that *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), establishes that plaintiffs need only assert that a conspiracy existed, rather than pleading any facts from which one can be inferred, because evidence gained in discovery may permit plaintiffs to prove their case with direct, rather than circumstantial, evidence. *Swierkiewicz* held that employment discrimination complaints need not allege the prima facie case established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), because the Title VII burden-shifting framework is designed to allow plaintiffs to prove discrimination with circumstantial evidence.[1] At the pleading stage, however, it is impossible to predict whether plaintiffs might discover direct evidence, and will therefore never need to avail themselves of *McDonnell Douglas* burden shifting. The extra pleading requirement therefore placed an artificial and unfair burden on plaintiffs. *Swierkiewicz*, 534 U.S. at 511-12, 122 S.Ct. 992. In support of its conclusion, the Court emphasized Rule 8's liberal standard of notice pleading, reasoning that alleging the elements of the Title VII

---

[1] Under this rule, a plaintiff would not only have to allege that she was a member of a protected class, was qualified for her position, and suffered an adverse employment action, but also would have to state facts suggesting that the adverse employment action occurred under circumstances raising an inference of discrimination. *Swierkiewicz*, 534 U.S. at 509, 122 S.Ct. 992. This presented a problem for many plaintiffs who, before any kind of discovery, would not be aware of the facts necessary to support an inference of discrimination, such as how similarly situated employees had been treated, or the employer's overall employment practices.

prima facie case was unnecessary to give defendants notice of the claim. *Id.* at 513, 122 S.Ct. 992. Thus, plaintiffs contend that, like the Title VII prima facie case, the parallel action "plus factors" are an evidentiary construct designed to be used at the summary judgment stage, when plaintiffs must rely on inferential evidence, and that *Swierkiewicz* establishes that they need not be pled to withstand a motion to dismiss. (Pls. Mem. at 5.)

Plaintiffs concede, however, that *Swierkiewicz* did not change the law of pleading (Tr. 22),[2] but simply re-emphasized the principles behind Rule 8 in order to establish that the Second Circuit's use of a heightened pleading standard for Title VII cases was contrary to the Federal Rules' structure of liberal pleading requirements, broad discovery, and use of summary judgment as the primary means of disposing of cases. *Swierkiewicz*, 534 U.S. at 513, 122 S.Ct. 992. Thus, *Heart Disease Research Foundation's* holding that plaintiffs must allege facts to support claims of conspiracy, even in light of Rule 8, 463 F.2d at 110, remains the law of this Circuit. This requirement of supporting facts is simply not analogous to the requirement that Title VII plaintiffs allege the *McDonnell Douglas* prima facie case, and is consistent with Rule 8 for two reasons.

First, the doctrine of conscious parallelism allows plaintiffs to state a claim by alleging conduct that is, in itself, not prohibited by § 1 of the Sherman Act. Because parallel conduct is often simply the result of similar decisions by competitors who have the same information and the same basic economic interests, allowing simple allegations of parallel conduct to entitle plaintiffs to discovery circumvents both § 1's requirement of a conspiracy and Rule 8's requirement that complaints state claims on which relief can be granted. *Kramer*, 890 F.Supp. at 255-56. In contrast, a Title VII plaintiff can state a claim by alleging simply that she was discriminated

---

[2] All cites to "Tr." refer to the transcript of the oral argument that took place before the Court on August 1, 2003.

against in her employment, and so requiring allegations of the prima facie case went beyond ensuring that a plaintiff had stated a legal claim, to adjudicating whether she would eventually be able to prove her claims.

Second, allegations of plus factors are necessary to give defendants notice of plaintiff's theory of the conspiracy. Because the factual basis of a Title VII claim is fairly self-evident – plaintiff suffered an adverse job action and alleges that it was the result of discrimination – the defendant will be apprised of the basic facts, and will know how to defend the action, even without the benefit of any allegations that raise the inference that discrimination actually occurred. In contrast, a plaintiff's factual and economic theory of a conspiracy is not evident from a conclusory allegation of conspiracy, and there is simply no way to defend against such a claim without having some idea of how and why the defendants are alleged to have conspired. The plus factors are therefore intended to give defendants notice of plaintiffs' legal theory, and of the "conduct which is alleged to be conspiratorial." *Levitch*, 495 F.Supp. at 675 ("This requirement is fully consistent with the liberal notice-pleading requirements in that it seeks only to notify the defendant of the legal theory upon which plaintiff intends to proceed."). Thus, the plus factors requirement is consistent with Rule 8, and remains in effect after *Swierkiewicz*.

II. *Plaintiffs' Allegations of Conspiracy*

Plaintiffs must allege facts from which a conspiracy can be inferred in order to state a claim under § 1. The alleged conspiracy between the defendants involved two agreements. (1) to collectively keep CLECs from successfully entering their markets, and (2) to refrain from attempting to enter each other's markets as CLECs. (Am.Compl.¶¶ 40, 47.) Thus, plaintiffs assert that, in furtherance of these agreements, defendants have all violated the provisions of the Act in order to render it impossible for CLECs to survive by competing to provide local telephone services, and have all failed to

become CLECs in each other's markets, despite the potential profits from doing so. Determining whether these instances of parallel behavior raise the inference that defendants agreed on their course of conduct involves examining plaintiffs' allegations as to the markets in which the defendants compete and their resulting economic interests.

This inquiry is admittedly difficult to distinguish from the factual analysis that is more appropriate to summary judgment, as is evidenced by the fact that cases involving motions to dismiss often cite summary judgment cases in support of their conclusions that plaintiffs have not alleged sufficient facts. *See, e.g., Kramer*, 890 F.Supp. at 255-56. While conclusory allegations may not suffice to state a claim, the Court must be cautious to avoid making findings or assumptions of fact without a complete factual record, and plaintiffs must not be expected to adduce evidence without having had the opportunity for discovery. The crucial inquiry, therefore, is what inferences naturally arise from the facts that plaintiffs have pled, taking all facts in the Amended Complaint as true. In the context of parallel conduct claims, the basic requirement that plaintiffs must fulfill is to allege facts that, given the nature of the market, render the defendants' parallel conduct, and the resultant state of the market, suspicious enough to suggest that defendants are acting pursuant to a mutual agreement rather than their own individual self-interest. This determination necessarily entails beginning with background propositions about how the market works when firms are competing, what it might look like if subject to an anti-competitive agreement, the economic interests of the market actors, and how those interests would cause them to act. While these questions resemble the factual issues that would have to be decided in the context of a summary judgment motion, on a motion to dismiss the Court may properly draw these background assumptions only from the facts pleaded in the complaint and the relevant statute, and may rely only on such background facts about the market and its history that are appropriate for judicial notice.

In this case, it is impossible to draw any inferences from plaintiffs' allegations regarding the state of the market actors relative to one another without being cognizant of the industry's history and regulation. Plaintiffs have attached to the Amended Complaint a map of defendants' respective territorial markets, which evidences the degree to which the defendants operate in separate markets. (Am.Compl.Ex. A.) Verizon controls the entire Northeast except for Connecticut; Bell South the Southeast; Qwest the Pacific Northwest and states as far east as Minnesota and as far south as New Mexico; and SBC the Midwest down to Texas, plus California and Nevada. (*Id.*) Thus, while the territories are not completely contiguous, the geographic segregation of the BOCs is striking. This overly neat allocation might be enough in itself to support an inference of conspiracy, in most industries, where one could view the defendants as non-monopolistic competitors who had begun competing in an open market and then apparently arranged it into a pattern of territorial fiefdoms. As discussed above, however, the telecommunications industry's history is hardly one of open competition between many firms. The BOCs were given monopolies in their respective territories as part of the MFJ in 1982, and state regulation maintained these monopolies and their boundaries up until 1996. (Am.Compl. ¶¶ 23, 27.) Even had the BOCs wanted to compete with each other, they would have been prevented from doing so by the entry barriers protecting each BOC. Thus, the geographic allocation evident from the map of BOC territories is not in itself suggestive of an anti-competitive agreement, shaped as it is by decades of state and federal regulation. The operative question, therefore, is whether it is possible to infer that the 1996 Act's permitting inter-territorial competition should have prompted the BOCs to move into each other's territories, and whether, seven years after the passage of the Act, the alleged failure of the BOCs to do so is suspicious enough to suggest a conspiracy.

Defendants argue that the fact that their respective territories have not merged into one competitive market is natural in

light of the industry's history and defendants' consequent economic interests. (Defs. Mem. at 14-17.) It is in each individual defendant's interests to keep CLECs out of their respective markets, they contend, and not in their interests to attempt to expand into other territories as CLECs. Accordingly, we must turn to the facts alleged in the Amended Complaint, to determine whether those allegations support an inference that defendants' conduct results from a conspiracy, rather than from their pursuit of their individual interests and the structure of the relevant markets.

A. *Conspiracy To Thwart CLECs*

Plaintiffs' theory that defendants acted pursuant to an agreement to keep CLECs from entering their markets by delaying their implementation of § 251 of the Act is not persuasive. Plaintiffs concede, as they must, that it is in each ILEC's individual economic interest to attempt to keep CLECs out of its market. (Tr. 29.) Defendants have challenged in the courts the Act's requirements that they provide their services to CLECs at wholesale prices, as well as the FCC's implementing regulations, arguing primarily that the methods by which state commissions were to determine the prices at which CLECs would be able to purchase services from ILECs failed to take into account their costs and resulted in "artificially low" prices. *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 793 (8th Cir.1997) (cited in Am. Compl. ¶ 36). Thus, the ILECs have argued that they were being forced to subsidize CLECs' entry into their markets. *Id.* Given their view of the pricing scheme to which they had to adhere, it would be in each ILEC's individual economic interest to attempt to discourage CLECs from entering the market and to render it difficult for them to survive once they had entered, as well as to challenge the pricing rules themselves. Thus, defendants' parallel action does not naturally give rise to an inference of an agreement, since the behavior of each ILEC in resisting the incursion of CLECs is fully explained by the ILEC's own interests in defending its individual territory.

Although conceding that such resistence is the natural course for ILECs, plaintiffs nevertheless contend that defendants needed an agreement to thwart CLECs' efforts because it was in their collective interest to ensure that all four ILECs would not allow any CLECs into their markets. Thus, they claim, defendants had two common motives to conspire to ensure that they all acted in the same ways. First, any CLEC that succeeded in one ILEC's territory would be more likely to "present a competitive threat" in other ILECs' territories. Second, if a CLEC were to succeed in one territory, it would prove that CLECs could be successful in other places if the other ILECs were not attempting to thwart them. (Am.Compl.¶ 50.) These are essentially arguments that, even if it was in each ILEC's interest to keep CLECs out, the ILECs collectively had reason to ensure that no CLEC anywhere could succeed, presumably in order to prove to Congress that its intended system of competition was impracticable. (Tr. 29.)

This theory does not posit any motivation independent of defendants' individual economic interests, however. Given that each ILEC has reason to want to avoid dealing with CLECs and having to "subsidize" their entry into the market, each ILEC would attempt to keep CLECs out, regardless of the actions of the other ILECs. The asserted motivations to make an agreement – the possibility that CLECs that make inroads in other ILECs' territories might want to compete in, for instance, Verizon's market, or that CLECs' success in other markets might suggest that Verizon was engaging in illegal efforts to thwart the CLECs in its own market – are not considerations that would affect Verizon's initial decision as to whether or not to fight the CLECs in its own market. That decision would be based, as plaintiffs' allegations suggest (Am.Compl.¶¶ 39, 47), only on its economic interest in maintaining its own market power, and since the ILECs are similar firms with similar information and interests, they could rationally expect that each of them will reach the same conclusions as to the course of action that best suits their interests.

whether or not an agreement exists. *Kramer*, 890 F.Supp. at 255-56. No agreement would be necessary for all ILECs to be relatively certain to reap the alleged added benefits to be gained from parallel action. Plaintiffs suggest no reason whatever to believe that any of the defendants, absent an agreement with the others, would have had any reason to adopt a policy of welcoming CLECs into its territory. Thus, the motives that plaintiffs have proffered do not provide any basis to infer that defendants' conduct was the result of anything but their individual economic interests.

B. *Conspiracy Not To Compete As CLECs*

Plaintiffs' second theory, that defendants refrained from entering each other's markets as CLECs, presents a closer question. Plaintiffs have alleged that, for each defendant, becoming a CLEC in another ILEC's territory would be an attractive business opportunity because, as the ILECs themselves have complained, CLECs hurt ILECs by buying their services and network elements at low rates. (Am.Compl.¶¶ 39, 40.) Competing as CLECs, plaintiffs claim, would also be feasible in light of the fact that, due to mergers, each ILEC controls some territory that is completely surrounded by another ILEC's territory. For instance, SBC controls Connecticut, but Verizon controls the rest of the Northeast, so it should be an attractive proposition for Verizon to become a CLEC in Connecticut. (*Id.* ¶ 40.) In addition, plaintiffs allege that Richard Notebaert, CEO of Qwest, stated that competing as a CLEC "might be a good way to turn a quick dollar but that doesn't make it right." (*Id.* ¶ 42.) According to plaintiffs, his statement suggests that moving into other ILECs' markets as a CLEC would be in Qwest's economic interest, especially since Qwest was experiencing financial difficulties at the time (*id.* ¶ 43), but that such conduct would not be "right" because of the ILECs' agreement not to compete with each other. Plaintiffs' basic theory, therefore, is that refraining from competing as CLECs was against the economic interests of each of the defendants, absent the assurance that each defendant would retain complete market power in its territory because

none of the other defendants would attempt to become CLECs in other markets. In light of the structure of the market as evidenced by the allegations in the Amended Complaint and the provisions of the 1996 Act, however, it is apparent that this conduct is also attributable to defendants' individual economic interests, and therefore does not raise an inference of conspiracy.

Plaintiffs' theory reflects a number of assumptions about the nature of the market in which CLECs operate, and the relationship between being an ILEC and being a CLEC. Most fundamentally, plaintiffs assume that moving into other markets as CLECs would be in ILECs' individual economic interests. This would be the case only if it appears to be profitable to do so; in other words, if the financial outlay involved in becoming a CLEC is expected to be outweighed by the profits to be gained. Plaintiffs also assume that ILECs' geographic proximity to certain other territories, as well as the ILECs' economic power, would give them "substantial competitive advantages" that would warrant their entering the market. (*Id.* ¶¶ 40-41, 43.) Plaintiffs' theory also presumes that economic damage to ILECs as a result of § 251's requirements is equivalent to financial success on the part of CLECs. (*Id.* ¶ 39.) Essentially, the logic of plaintiffs' complaint is that the failure of one telephone company to attempt to enter the adjacent territory of another telephone company can only (or at least most logically) be explained by a classic conspiracy to divide territories.

Plaintiffs' assumptions are severely undermined, however, by the fact that being a CLEC in another ILEC's territory is an entirely different business than being an ILEC. An ILEC controls and maintains the telecommunications infrastructure in its territory, offering customers a variety of types of access to that network, such as "voice, fax, or analog modem calls from a residence or business." (Am.Compl.¶ 3.) Thus, ILECs are self-sufficient businesses: they offer services directly to end users at prices that presumably cover their operating costs. Because the nature of telecommunications net-

works is such that for a competitor to build a duplicate infrastructure in a particular territory would be prohibitively expensive and create precisely the inefficiencies that telecommunications regulation has always sought to avoid. § 251 conceives of CLECs as working on a different business model. CLECs do not maintain their own infrastructure,[1] instead "obtain[ing] access to an incumbent's network." *Iowa Utils. Bd.*, 525 U.S. at 371-72, 119 S.Ct. 721. Thus, a CLEC's business is completely dependent on its relationship with the local ILEC. CLECs are essentially middlemen, buying network time from ILECs at wholesale prices, repackaging it, and selling it for a profit. The extent to which they must depend on the relevant ILEC is demonstrated by plaintiffs' allegations as to the ILECs' wrongdoing with respect to CLECs, including that "[d]efendants [ILECs] have failed to provide the same quality of service to [CLECs] that [they] provided to their own retail customers," and "have failed to provide access to their operational support systems . . . on a nondiscriminatory basis that places competitors at parity." (Am.Compl.¶ 47.) Thus, the extent to which competing as a CLEC is profitable will depend in substantial part on the terms that can be negotiated with the ILEC, whether the relationship is successful or dispute-ridden, and whether the ILEC fulfills its obligations under § 251.

The difference between being a CLEC and being an ILEC has several implications. First, ILECs who attempt to become CLECs in another ILEC's territory have little competitive advantage over other CLECs. Presumably, the main advantages an ILEC would have over other CLECs in attempting to enter another ILEC's territory as a CLEC are the ILEC's existing

---

[1] While CLECs may have their own networks, in the way that long-distance carriers have their own networks that allow them to direct calls, CLECs do not possess the physical infrastructure that allows end users to connect to the exchange networks. (Am.Compl.¶ 47(*l*).) *See also Trinko*, 305 F.3d at 94.

infrastructure and its greater ability to invest in new ventures.[4] (Am. Compl. ¶ 23 (discussing ILECs' market power)). Yet an ILEC's market power in its home territory does not translate into market power as a CLEC in another ILEC's territory. An ILEC's infrastructure would not be of great assistance in its entry into a new territory as a CLEC, because § 251 is premised on the assumption that it would be impossible for other companies to compete with ILECs to provide services directly to users. In buying and re-selling these services from the relevant ILEC, ILECs acting as CLECs are in much the same position as other, smaller, CLECs. Thus, the investment involved in becoming a CLEC is the same for Verizon and SBC as it would be for smaller CLECs; all CLECs would have to invest enough in purchasing services from the ILEC to render reselling them profitable. Moreover, while well-known CLECs and ILECs acting as CLECs possess intangible assets such as name recognition and goodwill, these provide competitive advantages only with respect to consumers; because so much of the CLEC's operation is predicated on its relationship with the ILEC, the CLEC cannot easily leverage these assets into its own independent market power. Because of CLECs' necessary dependence on ILECs, an ILEC acting as a CLEC is in substantially the same position, and must undertake the same economic calculus, as any other CLEC.

Second, for much the same reasons, it is not clear that geographical proximity, or the degree to which a territory is surrounded by another ILEC's territory, provides the competitive advantage to an ILEC acting as a CLEC that plaintiffs assume. Since being a CLEC is a different business than being an ILEC, expanding into a new area is not simply a question of expanding one's infrastructure, or using the existing infra-

---

[4] Of course, this may not always be the case, since other CLECs include AT & T, MCI, and Sprint, long-distance companies that have established capital and, presumably, the ability to invest it. *See Trinko*, 305 F.3d at 94 (discussing AT & T's fight to become a CLEC in Verizon's territory).

structure to provide the same services in a new location. Thus, a CLEC moving into a new telecommunications territory is unlike, for instance, an ice cream seller moving into a new territory, because an ILEC's ability to sell services as a CLEC in the new territory is not necessarily enhanced by the proximity of its infrastructure. The purchase and resale structure created by § 251 is necessary precisely because it is impossible, and undesirable, for would-be competitors simply to set up their own infrastructure in a new territory and begin directly selling services to users. Even if taking advantage of the option of interconnecting with elements of the ILEC's network may be somewhat easier for a neighboring ILEC acting as a CLEC, the CLEC is still dependent on its relationship with the ILEC for survival; the ILEC-as-CLEC cannot leverage geographical proximity into independence, and therefore is not materially different from a CLEC without a nearby territory of its own.

Because the ILEC-as-CLEC is no different from any other CLEC with respect to its entry into new markets, the question of whether becoming a CLEC is in an ILEC's economic interest must be answered by determining whether competing as a CLEC is, as a general matter, a profitable endeavor. According to plaintiffs themselves, being a CLEC is an extraordinarily difficult enterprise. Plaintiffs assert that ILECs have been obstructionist is providing CLECs with the tools necessary to engage in business: they have sold low quality services to CLECs (*id.* ¶ 47(a)); discriminated in providing access to their operational support systems (*id.* ¶ 47(b)); created "undue delays" in providing unbundled network elements (*id.* ¶ 47(c)); provided low quality interconnection between their networks and the CLECs' (*id.* ¶ 47(e)); and "refused to allow [CLECs] to connect to essential facilities," including telephone lines and switching stations (*id.* ¶ 47(h)). ILECs have also made CLECs' necessary interactions with them extremely difficult, by "impos[ing] slow and inaccurate manual order processing" of CLECs' orders (*id.* ¶ 47(j)), and using "error filled methods to bill [CLECs] in order to discourage competition by

making it virtually impossible for [CLECs] to audit the bills the receive[]" from the ILECs' (*id.* ¶ 47(i)). Finally, ILECs have allegedly "severely impacted [CLECs'] relationships with customers" by continuing to bill those who switch to CLECs from ILECs' service (*id.* ¶ 47(d)), thereby eroding whatever goodwill a CLEC may have possessed when it entered the market.

According to plaintiffs' own allegations, therefore, it is quite difficult to enter the market as a CLEC, and harder still to make a profit in the face of determined resistance from the ILEC. While plaintiffs assume that, because ILECs have complained that the pricing structure created by the 1996 Act forces them to subsidize CLECs, to their financial disadvantage, ILECs should view becoming CLECs in others' markets as a lucrative opportunity (*id.* ¶ 39), aspects of the regulatory scheme that allegedly have a harmful effect on ILECs do not necessarily translate into easy success for CLECs. Plaintiffs' own factual allegations, which must be accepted as true for purposes of this motion, establish that ILECs have successfully impeded CLECs' using § 251 to create viable business opportunities. Thus, plaintiffs themselves refute their theory that becoming a CLEC is an obviously profitable opportunity for an ILEC.

There is therefore no basis to believe that ILECs would perceive becoming a CLEC as in their economic interests. Plaintiffs' allegations raise the inference that each ILEC is well aware that becoming a CLEC in another market would be extremely difficult in the face of opposition from the local ILEC, because it is using the same tactics against CLECs in its market. Given that each ILEC possesses monopolistic market power in its own territory (*id.* ¶ 47(k)), there is no apparent reason for an ILEC to attempt to push out of its own territory and brave the barriers thrown up by other ILECs. This is especially the case since, as plaintiffs allege, ILECs have been largely successful in keeping CLECs from building viable businesses (*id.* ¶ 47; Pls. Mem. at 2), thus discouraging ILECs, particularly those such as Qwest that are suffering fi-

nancial difficulties (Am.Compl.¶ 43), from wanting to invest much-needed capital in a venture that is likely to fail. Moreover, ILECs have no reason to become CLECs in order to hurt other ILECs by forcing them to sell services at the assertedly confiscatory prices, because the ILECs do not compete with each other in the local telephone services market. (*Id.* ¶ 23.) Thus, Verizon, for example, would have no incentive to spend money simply to wreak economic damage on SBC or the other ILECs.

The statements of Qwest CEO Richard Notebaert, quoted in the Amended Complaint, are not to the contrary. Plaintiffs assert that Notebaert's comment that becoming a CLEC in another ILEC's territory "might be a good way to turn a quick dollar but that doesn't make it right" (*id.* ¶ 42) establishes that not competing as CLECs was contrary to defendants' economic interests. (Pl. Mem. at 9-10.) The Court may consider the entirety of the newspaper article from which plaintiffs drew Notebaert's comment, as well as related articles quoted in the Amended Complaint, because plaintiffs have notice of the documents and have relied on them as evidence of defendants' wrongdoing in bringing suit. Cortec *Industries, Inc. v. Sum Holding, L.P.*, 949 F.2d 42, 47-48 (2d Cir.1991).[5] Considered in context, Notebaert's statements suggest only that he did not consider becoming a CLEC to be a sound long-term business plan, because all of the ILECs were challenging § 251 and its pricing structure through litigation, and the legal landscape in which CLECs operate could have changed at any time. (Bradbury Dec. Exs. D, E.) Since prioritizing long-term over short-term economic interest is well within a company's range of rational choices that do not raise suspicions of conspiracy, Notebaert's statements do not support plaintiffs' theory.

---

[5] Moreover, defendants have attached the full text of the cited articles to their motion papers (Bradbury Dec. Exs. D-F), and plaintiffs have not objected.

Plaintiffs have therefore not alleged facts that suggesting that refraining from competing in other territories as CLECs was contrary to defendants' apparent economic interests, and consequently have not raised an inference that their actions were the result of a conspiracy. For an ILEC to compete as a CLEC in an adjoining ILEC's territory would not be simply to extend their existing business into a neighboring region, but rather would be to invest in undertaking an entirely different kind of business. Given the obstacles to becoming a successful CLEC, defendants' uncontested market power in their own territories, the fact that being a CLEC is a different business model from being an ILEC, defendants' reluctance to branch out into the CLEC market is perfectly consistent with independent decisions that their economic interests were better served by concentrating on their traditional businesses as ILECs, or, for that matter, investing in entirely different enterprises. It is no more surprising, and raises no more inference of concerted action, that the ILECs have not gone into business as CLECs than that they have all collectively failed to enter some other line of business.

Plaintiffs also have not sufficiently alleged that defendants had a strong common motive to conspire. *Apex Oil*, 822 F.2d at 254. Although the Amended Complaint does not explicitly delineate a motive for defendants' alleged territorial allocation agreement, the motive inherent in such an agreement would be that each conspirator would reap greater profits from its respective territory, free of competition, in return for staying out of other territories. Defendants would have no need to agree to collectively refrain from entering each other's territories, however. Since doing so is not simply a matter of expanding an existing infrastructure and business, and entering as a CLEC is allegedly prohibitively difficult, it would be natural for defendants to refrain from competing with each other on their own. Moreover, ILECs have no great incentive to agree to keep each other from threatening their market control in their respective territories, since, as plaintiffs assert (Am.Compl.¶ 47), each ILEC has been successful in thwart-

ing the CLECs in its market, and has no reason to believe that it would be incapable of thwarting other ILECs acting as CLECs as well. Without some motivation that would make conspiring to reach a result far more effective or profitable than allowing natural self-interest to persuade each ILEC independently to reach the same decision, there is no reason to infer a conspiracy. *See Ambook Enter. v. Time Inc.*, 612 F.2d 604, 616 (2d Cir.1979).

The allegations of plaintiffs' complaint provide no reason to believe that defendants' parallel conduct was reflective of any agreement. The complaint therefore alleges nothing more than parallel conduct that appears to accord with the individual economic interests of the alleged conspirators. Accordingly, plaintiffs have not adequately alleged that defendants violated § 1 of the Sherman Act.[6]

CONCLUSION

Defendants' motion to dismiss the Complaint is granted. Defendant BellSouth's motion to dismiss for lack of personal jurisdiction is consequently denied as moot.

SO ORDERED.

---

[6] It is therefore unnecessary to reach defendants' argument that the plaintiffs' damages claims are barred by the filed rate doctrine, or BellSouth's objection to personal jurisdiction.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

Date:	1/3/06
Docket Number:	03-9213-cv
Short Title:	Twombly v. Bell Atlantic Corp.
DC Docket Number:	02-cv-1022
DC:	SDNY (NEW YORK CITY)
DC Judge:	Honorable Gerard Lynch

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 3rd day of January two thousand six.

WILLIAM TWOMBLY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED
AND LAWRENCE MARCUS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

BELL ATLANTIC CORPORATION, BELLSOUTH CORPORATION, QWEST COMMUNICATIONS INTERNATIONAL, INC., SBC COMMUNICATIONS INC. AND VERIZON COMMUNICATIONS INC.,

Defendants-Appellees.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellees Bell Atlantic Corporation, et al. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court:
Roseann B. MacKechnie, Clerk
By: /s/ ARTHUR M. HELLER
Motion Staff Attorney

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

FILED
MAY 24 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1126

IN THE

Supreme Court of the United States

BELL ATLANTIC CORPORATION, *et al.*,

Petitioners,

v.

WILLIAM TWOMBLY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

JOSEPH H. MELTZER
SCHIFFRIN & BARROWAY, LLP
Three Bala Plaza East
Suite 400
Bala Cynwyd, PA 19004
(610) 667-7706

J. DOUGLAS RICHARDS
Counsel of Record
MICHAEL M. BUCHMAN
MILBERG WEISS BERSHAD
& SCHULMAN LLP
One Pennsylvania Plaza
New York, NY 10119-0165
(212) 594-5300

Attorneys for Respondents

201364

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the Second Circuit correctly found that a complaint stated a claim for an agreement in restraint of trade under Section 1 of the Sherman Act, when extensive factual allegations were made to support plaintiffs' conspiracy allegations – which the Second Circuit concluded were sufficient to make an inference of conspiracy from the pleaded facts "plausible" – including but not limited to: (i) allegations of the defendants' "very apparent non-competition policy in each others' markets"; (ii) allegations of the conventional "plus factor" that defendants' non-competition with one another would have been contrary to their self-interests in the absence of a conspiracy, which the Second Circuit concluded "makes it particularly difficult to conclude that the allegations contained in the complaint are insufficient to state a claim"; and (iii) allegations of statements made to Congress by defendants that are inconsistent with their claimed competitive reasons for not competing in one anothers' markets.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iv
Preliminary Statement	1
Reasons for Denying the Petition	7
I. The Decision Below Is Consistent With This Court's Precedents On Pleading Standards Under The Federal Rules.	7
II. The Decision Below Is Consistent With All Case Law Interpreting *Swierkiewicz* And Does Not Conflict With Current Law In Any Circuit.	9
III. The Decision Below Does Not Conflict With This Court's Decision In *Dura*.	12
IV. The Summary Judgment Standards In *Matsushita* Do Not And Should Not Apply To A Motion To Dismiss Under Rule 12(b)(6).	13
A. To apply *Matsushita* on a motion to dismiss would violate multiple established pleading standards.	14
B. To apply *Matsushita* on a motion to dismiss would impose unrealistic burdens on jurists.	16

Contents

Page

C. To apply *Matsushita* on a motion to dismiss would unbalance risks of error. 17

V. Petitioners Mischaracterize Plaintiffs' Allegations To Erect A "Straw Man" Argument That Only "Innocuous Parallel Conduct" Is Alleged. 19

A. Background 19

B. Nature of the Case 21

C. Many Specifically Alleged Facts Suggest Conspiracy. 22

D. Plaintiffs have sufficiently alleged facts suggesting conspiracy to allocate markets and refrain from out-of-region local competition. 27

E. Plaintiffs also have sufficiently alleged facts suggesting conspiracy to restrain in-region competition from CLECs. ... 28

VI. Petitioners Disagree Mainly With The Second Circuit's Conclusion That Plaintiffs' Extensive Allegations Of Fact Make A Conspiracy Plausible, Which Is Not An Issue Appropriate For Certiorari. 29

Conclusion 30

TABLE OF CITED AUTHORITIES

Page

CASES

Andrx v. Pharm., Inc. v. Elan Corp.,
421 F.3d 1227 (11th Cir. 2005) 10

Apex Oil Co. v. Di Mauro,
822 F.2d 246 (2d Cir. 1987) 26

Cayman Exploration Corp. v. United Gas Pipe Line Co.,
873 F.2d 1357 (10th Cir. 1989) 10, 11

Chao v. Rivendell Woods, Inc.,
415 F.3d 342 (4th Cir. 2005) 9

Conley v. Gibson,
355 U.S. 41 (1957) 16, 27, 28

Cont'l Ore Co. v. Union Carbide & Carbon Corp.,
370 U.S. 690 (1962) 22

DM Research, Inc. v. College of America Pathologists,
170 F.3d 53 (1st Cir. 1999) 10, 11

Doe v. Cassel,
403 F.3d 986 (8th Cir. 2005) 9

Dura Pharms, Inc. v. Broudo,
125 S. Ct. 1627 (2005) 6, 12, 13

Educadores Puertorriquenos En Accion v. Hernandez,
367 F.3d 61 (1st Cir. 2004) 9, 11

Empress LLC v. City & County of San Francisco,
419 F.3d 1052 (9th Cir. 2005) 10

Cited Authorities

Page

GE Capital Corp. v. Posey,
415 F.3d 391 (5th Cir. 2005) 9

Granite Partners, L.P. v. Bear, Stearns & Co.,
58 F. Supp. 2d 228 (S.D.N.Y. 1999) 25

Hawaii v. Standard Oil Co.,
405 U.S. 251 (1972) 5

In re High Fructose Corn Syrup Antitrust Litigation,
295 F.3d 651 (7th Cir. 2002) 25, 27

Hospital Building Co. v. Trustees of Rex Hospital,
425 U.S. 738 (1976) 6

Interstate Circuit, Inc. v. United States,
306 U.S. 208 (1939) 25

Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,
507 U.S. 163 (1993) ..... *passim*

Matsushita Electric Industrial Co. v. Zenith Radio Corp.,
475 U.S. 574 (1986) ..... *passim*

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) 3, 5

Monsanto Co. v. Spray-Rite Serv. Corp.,
465 U.S. 752 (1984) 2, 14

NHL Players Association v. Plymouth Whalers Hockey Club,
419 F.3d 462 (6th Cir. 2005) 10, 12, 16

Cited Authorities

Page

In re Nasdaq Market-Makers Antitrust Litigation,
894 F. Supp. 703 (S.D.N.Y. 1995) 26

Poller v. Columbia Broad. System,
368 U.S. 464 (1962) 6

Radovich v. National Football League,
352 U.S. 445 (1957) 5

Reiter v. Sonotone Corp.,
442 U.S. 330 (1979) 5

Swierkiewicz v. Sorema N.A.,
534 U.S. 506 (2002) ..... *passim*

In re Tamoxifen Citrate Antitrust Litigation,
429 F.3d 370 (2d Cir. 2005) 1

Thomson v. Washington,
362 F.3d 969 (7th Cir. 2004) 9

In re Tower Air, Inc.,
416 F.3d 229 (3d Cir. 2005) 9

United States v. Employing Plasterers Association,
347 U.S. 186 (1954) 6

United States v. Topco Associates,
405 U.S. 596 (1972) 5

Verizon Communications Inc.
v. Law Offices of Curtis V. Trinko LLP,
124 S. Ct. 872 (2004) 21

Cited Authorities

Page

LAW REVIEW ARTICLES

Arthur R. Miller, The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?, 78 N.Y.U. L. Rev. 982 (June 2003) 14, 15, 18

PRELIMINARY STATEMENT

Petitioners' attack on the decision below, like the analyses offered by their amici, rests on a "straw man" argument that fundamentally mischaracterizes the Second Circuit's opinion. Petitioners and their amici claim that the court below held that only "innocuous parallel conduct" need be alleged, to survive a motion to dismiss an antitrust conspiracy claim under Rule 12 (b)(6). Petition ("Pet.") 1 ("The court held that a complaint can survive a motion to dismiss simply by alleging otherwise innocuous parallel conduct. . . ."). But the Second Circuit's opinion does *not* state that allegations of "parallel conduct" are necessarily (or "always", Pet. 2) sufficient. Instead, what the court held below was that allegations that an agreement in restraint of trade exists must be accompanied by "the factual predicate upon which those assertions are made" (Pet. App. 23a, 25a), and that the alleged factual predicate "does need to include conspiracy among the realm of plausible possibilities." Pet. App. 19a. "If a pleaded conspiracy is implausible on the basis of the facts as pleaded – if the allegations amount to no more than 'unlikely speculations' – the complaint will be dismissed." Pet. App. 20a. Thus, under the Second Circuit's clear formulation, *facts* must be pleaded which make an inference of conspiracy from those pleaded facts a "plausible" one.

For example, the Second Circuit has held in another recent decision that this requirement of "plausible" factual allegations to support a conspiracy allegation was *not* satisfied. *In re Tamoxifen Citrate Antitrust Litig.*, 429 F.3d 370, 402 (2d Cir. 2005)(affirming dismissal under Rule 12(b)(6) on grounds that "the pleaded conspiracy seems to us to be 'implausible.'"). As the holding in *Tamoxifen* exemplifies, the requirement of factual allegations that "plausibly" support an inference of conspiracy – which is the standard actually articulated by the Second Circuit below – is a significantly more demanding

one than Petitioners and their amici would have this Court believe.[1]

Contrary to Petitioners' argument, nothing in the decision below states that allegations of mere "parallel conduct" necessarily (or "always", Pet. 2) will satisfy that legal standard. Instead, the Second Circuit appropriately recognized that not all conduct that might be considered "parallel" has the same probative value, and that courts should look to "the *particular* parallelism asserted" to determine whether it supports a plausible inference of conspiracy. Pet. App. 25a (emphasis added). In this case, the most central conduct in question is defendants' "'very apparent non competition policy in each others' markets.'" Pet. App. 6a. This "particular parallelism" – a "very apparent policy" of non-competition with one another – is far more suggestive of conspiracy than various other forms of "parallel conduct" (such as mere parallel price changes or the like) might be. Petitioners and their amici attempt essentially to sidestep evaluation of these actual allegations, instead making a rigid and simplistic argument that *any* conduct that might be characterized as "parallel" in any sense is therefore *necessarily* insufficient to suggest conspiracy.

It is Petitioners' proposed legal standard – and not the standard adopted by the Second Circuit below – that would be unreasonable and contrary to established law. Petitioners argue that the governing *pleading standard* should be cloned directly from this court's *summary judgment* standards in *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574

---

1. For this reason, much of the argument by Petitioners' amici is simply misdirected. For example, the amici curiae economists direct their entire argument at a supposed "parallel behavior is enough" standard that would be much less demanding than the standard that the Second Circuit actually applied, even while expressly declining to "offer a view as to exactly how heavy an additional burden plaintiffs should bear." Brief of Amici Curiae Economists in Support of Petitioner, 2, 13. Like some of the other amicus briefs, the economists' brief never evaluates – indeed, it never even mentions – the Second Circuit's *actual* requirement that facts be alleged that give rise to a "plausible" inference of conspiracy.

(1986). Laying on unsupported "tort reform" rhetoric with a trowel, Petitioners argue principally that such a high standard is necessary in order to avoid "the colossal expense of undergoing discovery," Pet. 1, "mushrooming claims" and "incalculable costs," Pet. 3, and a supposed "avalanche of wasteful litigation." Pet. 11.[2] But arguments just like these have been rejected, recently and repeatedly, by this Court.

In *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), the Court reversed the Second Circuit's holding that a summary judgment standard closely analogous to the *Monsanto/Matsushita* standard (*i.e.*, the employment discrimination standard of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)) should be applied on a motion to dismiss, concluding that it was an impermissible "heightened pleading" standard and was not provided for in Rule 9 (b). The Court in *Swierkiewicz* refused even to consider an argument ("whatever" its "practical merits"), that application of conventional pleading standards would "burden the courts and encourage disgruntled employees to bring unsubstantiated suits." *Id.* at 514-15. Likewise, in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 166-69 (1993), the Court refused to consider policy arguments that ordinary pleading standards "would subject municipalities to expensive and time-consuming discovery in every § 1983 case," stating that absent amendments to the Federal Rules of Civil Procedure, "federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later." To no less a degree here than in *Swierkiewicz* and *Leatherman*, Petitioners' core argument, based entirely on the costs of

2. In the briefing below we challenged Petitioners to identify "any respectable study or judicial authority that could support an assertion that antitrust cases are generally lacking in merit or tend to settle for small 'harrassment value' sums," as Petitioners and their amici continue to suggest. But no such study or judicial authority has been cited, because none exists. Instead, Petitioners and their tort reform-oriented amici continue to rely on anecdotal references and assertions about *other* bodies of case law such as securities cases, where statutory measures were taken a decade ago to cure any perceived problems, as the Second Circuit points out in its opinion. Pet. App. 30a n. 13.

pretrial litigation, "wrongly equates freedom from liability with immunity from suit." *Leatherman*, 507 U.S. at 166. Indeed, other than the District Court in this case, *all* courts that have considered this issue since *Swierkiewicz*, in antitrust conspiracy cases like this one, have uniformly concluded that the principles articulated in *Swierkiewicz* and *Leatherman* foreclose the same "plus factors" argument that Petitioners make here in the context of antitrust conspiracy cases. *See* Pet. App. 26a n.9 (citing and discussing four recent antitrust cases applying *Swierkiewicz*).

Petitioners strain to portray the Second Circuit's opinion as though it invited this Court's intervention, in stating that if the balance struck by the Federal Rules of Civil Procedure is "to be re-calibrated . . ., it is Congress or the Supreme Court that must do so." Pet. App. 30a; *cf.*, Pet. 3 ("The Court should accept the Second Circuit's invitation."). However, the Second Circuit was merely observing that its decision is effectively mandated by the Federal Rules of Civil Procedure, which were promulgated under this Court's authority. To be sure, if this Court or Congress were to change those rules, they hypothetically could effectuate a radical change in the law of the type that Petitioners seek. However, this Court already has made crystal clear that it will *not* change the governing rules on an *ad hoc* basis in particular cases like this one. *See Swierkiewicz*, 534 U.S. at 515 ("A requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'") (quoting from *Leatherman*, 507 U.S. at 168). Thus, Petitioners' entire argument flies in the face of principles unambiguously embraced by this Court.

The "plausibility" standard articulated by the Second Circuit below is an eminently reasonable one, and is in harmony with the Federal Rules of Civil Procedure. It does not, as Petitioners erroneously argue, permit a complaint to survive if it merely alleges "innocuous parallel conduct" coupled with a mere "conclusion" of "conspiracy." Instead, it is flexible enough to take into account – in addition to a requirement that facts and not only conclusions be alleged –

the fact that if direct evidence of conspiracy is uncovered in discovery, inferential proof of conspiracy based on "plus factors" is then unnecessary. *Cf.*, *Swierkiewicz*, 534 U.S. at 511 (to apply the *McDonnell Douglas* summary judgment standard on a motion to dismiss would be "incongruous" since "if a plaintiff is able to produce direct evidence of discrimination, he may prevail without proving all of the elements of a prima facie case" under *McDonnell Douglas*). In addition, in conspiracy cases like this one where "plus factors" have in fact been alleged – as explained in greater detail below – it permits such allegations to be evaluated generously and flexibly, rather than in the more rigid fashion that might be appropriate in the context of specific evidence on a motion for summary judgment. *See Id.* at 512. ("Given that the [*McDonnell Douglas*] prima facie case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard for discrimination cases.").

If any area of law were an appropriate one in which to deviate from the principles laid down in *Swierkiewicz* and *Leatherman*, it would *not* be antitrust law, in view of the vital importance of antitrust law,[3] and of private litigation to its adequate enforcement.[4] Thus, in refusing to make an exception from *Swierkiewicz* for antitrust cases, the court below rightly emphasized that the antitrust enforcement regime "contemplates the enforcement of antitrust laws in large measure by private litigants." Pet. App. 29a. As recognized in *Radovich v. Nat'l Football League*, 352 U.S. 445, 454 (1957), "[i]n the face of such a policy this Court should not add

---

3. "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972).

4. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) (private actions "provide a significant supplement to the limited resources available to [DOJ] for enforcing the antitrust laws and deterring violations"); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262, 266 (1972) (In the antitrust laws "Congress encouraged [private litigants] to serve as 'private attorneys general.').

requirements to burden the private litigant beyond what is specifically set forth by Congress in those [antitrust] laws."

Moreover, this Court's precedents recognize that summary disposition is uniquely problematic "in complex antitrust litigation where motive and intent play leading roles, *the proof is largely in the hands of the alleged conspirators*, and hostile witnesses thicken the plot." *Poller v. Columbia Broad. Sys.*, 368 U.S. 464, 473 (1962)(emphasis added). *Accord, Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 746 (1976) ("[I]n antitrust cases, *where 'the proof is largely in the hands of the alleged conspirators,'* . . . dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.") (emphasis added, quoting from *Poller*). Those established antitrust pleading principles are incompatible with Petitioners' argument that in order even to survive a motion to dismiss, a plaintiff pleading an antitrust conspiracy must already have in its possession, and must plead, specific details of the "who, what, when and where" of the alleged conspiracy. Pet. 2. Such a requirement also would conflict with the holding in *United States v. Employing Plasterers Ass'n*, 347 U.S. 186, 189 (1954), that in antitrust cases "where a bona fide complaint is filed that charges every element necessary to recover, summary dismissal of a civil case for failure to set out evidential facts can seldom be justified."

For these reasons, and others articulated below, the arguments advanced by Petitioners are clearly foreclosed by numerous precedents in this Court. Petitioners' arguments that the decision below is in conflict with other Circuits, and with the Court's recent decision in *Dura Pharms, Inc. v. Broudo*, 125 S. Ct. 1627 (2005), are baseless. The petition for certiorari should therefore be denied.

REASONS FOR DENYING THE PETITION

I. The Decision Below Is Consistent With This Court's Precedents On Pleading Standards Under The Federal Rules.

There are no heightened pleading requirements for antitrust cases. In *Swierkiewicz* this Court most recently reiterated that all that is required is a "short and plain statement" of the claim, pursuant to Fed. R. Civ. P. 8(a)(2). 534 U.S. at 508. *Swierkiewicz* states outright that it makes no sense to require a plaintiff to allege all elements of a "*prima facie* case" of employment discrimination, because if direct evidence of discrimination were to emerge in discovery such an inferential case would be unnecessary at trial, and it would be "incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered." 534 U.S. at 511-12. In precisely the same way in this case, one need not specifically allege "plus factors" that would permit an inference of conspiracy from parallel conduct, since if direct evidence of conspiracy emerges in discovery, an inferential case based on "plus factors" will be entirely unnecessary. Defendants' argument that "plus factors" were required to be alleged in excruciating detail attempts to resurrect "heightened pleading" standards, precisely analogous to those adopted by the Second Circuit prior to its reversal in *Swierkiewicz*, which this Court in *Swierkiewicz* resoundingly rejected.

Petitioners argue that "unlike the complaint in *Swierkiewicz* – which alleged the who, what, where, when and why facts underlying a straightforward legal claim – the complaint here contains a bare allegation of conspiracy. . . ." Pet. 16. Not only is Respondents' cramped construction of *Swierkiewicz* at odds with clear authority in the circuit courts, but it cannot be squared with *Swierkiewicz* itself, for at least two elementary reasons.

First, the allegation in *Swierkiewicz* was essentially that the plaintiff was fired because he was Hungarian. In

comparison to Plaintiffs' allegations here, the plaintiff in *Swierkiewicz* pled much *less* to establish the discriminatory motive that they alleged. *See* 534 U.S. at 510 (District Court in *Swierkiewicz* stated that plaintiff did *not* allege "'circumstances that support an inference of discrimination'"; Second Circuit stated that allegations did *not* "'raise an inference of discrimination'"; and this Court's opinion assumed correctness of those views). Petitioners' distinction of *Swierkiewicz* on the basis that "[u]nlike discrimination based on national origin, parallel conduct is not unlawful" (Pet. 16) is specious, because evidence sufficient to infer unlawfulness was not alleged in *Swierkiewicz*, as all courts to consider the case agreed.

Second, the actual language and reasoning of *Swierkiewicz* – which Respondents studiously avoid – makes their interpretation of the case untenable. *Swierkiewicz* certainly does not reason, as Respondents would have it, that the plaintiff had made such detailed allegations of evidentiary fact that a circumstantial case at trial would be unnecessary. Respondents' proposed interpretation turns *Swierkiewicz* on its head, suggesting that it held that a *prima facie* case of discrimination need not be pleaded only if direct evidence of discrimination sufficient to prove the plaintiff's case *has been pleaded*. This is just the opposite of what *Swierkiewicz* says. Instead, the Court clearly held that the possibility that direct evidence of discrimination that had *not* been pleaded could be later "discovered" was enough to make the pleading of a *prima facie* case unnecessary. 534 U.S. at 511-12. *Swierkiewicz* unambiguously rejects Petitioners' entire premise that the appropriate purpose of a motion to dismiss is to avoid a "burden on the courts" or to deal with "unsubstantiated lawsuits," making clear – as had been earlier emphasized in *Leatherman* – that those functions are served instead by summary judgment after discovery. *Id.* at 514-15 ("[C]laims lacking in merit may be dealt with through summary judgment. . . . Rule 8(a) establishes a pleading standard without regard to whether a claim will succeed on the merits"). That Respondents cannot support their position without such transparent distortions of *Swierkiewicz* merely dramatizes its stark conflict with their argument.

II. The Decision Below Is Consistent With All Case Law Interpreting *Swierkiewicz* And Does Not Conflict With Current Law In Any Circuit.

As the Second Circuit points out in its opinion, at least four antitrust conspiracy cases, decided since *Swierkiewicz* and similar in pertinent respects to this case, have specifically rejected the arguments that Petitioners make here, in reliance on this Court's decision in *Swierkiewicz*. Pet. App. 26a n.9 (citing and discussing cases). Similarly, amicus American Petroleum Institute concedes that the Third and Fifth Circuits have agreed with the Second Circuit's conclusion below. *See* Brief of The American Petroleum Institute as Amicus Curiae, at 11. More broadly, since *Swierkiewicz* virtually every Circuit Court of Appeals also has embraced the basic view – which is fatal to Petitioners' arguments – that "heightened pleading standards" of the type advocated by Petitioners cannot properly be judicially erected outside the narrow contexts in which particularity in pleading is specifically required under Rule 9(b).[5] All of that case law interprets *Swierkiewicz* uniformly

---

5. *Educadores Puertorriquenos En Accion v. Hernandez*, 367 F.3d 61, 66 (1st Cir. 2004) ("overruling" prior decisions erecting heightened pleading standards and doing so "globally," while observing that in *Swierkiewicz* "the Court has signaled its disapproval of all heightened pleading standards except those that emanate from either congressional or Rule-based authority"); *In re Tower Air, Inc.*, 416 F.3d 229, 237-38 (3d Cir. 2005) ("a plaintiff will not be thrown out of court on a Rule 12(b) (6) motion for lack of detailed facts" and "[t]o hold otherwise would be effectively to transform Rule 12(b) (6) motions into multi-purpose summary judgment vehicles. That we will not do."); *Chao v. Rivendell Woods, Inc.*, 415 F.3d 342, 347 (4th Cir. 2005) ("unmeritorious claims . . . are eliminated not by motions to dismiss, but rather primarily through 'liberal discovery rules and summary judgment motions'"); *GE Capital Corp. v. Posey*, 415 F.3d 391, 396-97 (5th Cir. 2005) ("[o]ther than in the situations expressly enumerated in rule 9(b), e.g. allegations of actual fraud, plaintiffs must satisfy only the minimal requirements of rule 8(a)."); *Thomson v. Washington*, 362 F.3d 969, 970-71 (7th Cir. 2004) ("Federal judges are forbidden to supplement the federal rules by requiring 'heightened' pleading of claims not listed in Rule 9(b)"); *Doe v. Cassel*, 403 F.3d 986, 989 (8th Cir. 2005) ("The only permissible heightened pleading requirements in civil suits are those contained in the Federal Rules of Civil Procedure or those in federal statutes enacted by

(Cont'd)

and correctly, in holding that "heightened pleading" requirements (such as Petitioners' proposed "plus factors pleading requirement") are impermissible.

In purported opposition to this solid wall of authority, Petitioners claim that there is a conflict between the Circuits in light of only three Circuit decisions (two of which preceded *Swierkiewicz*) — *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357 (10th Cir. 1989), *DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53 (1st Cir. 1999) and *NHL Players Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462 (6th Cir. 2005). Petitioners' many amici identify no other Circuit Court opinions with which the Second Circuit's opinion could be said to conflict, instead simply recycling Petitioners' reliance on *Cayman*, *DM Research* and *NHL*. But no genuine conflict exists with any of these decisions.

Not only was *Cayman* decided long before either *Leatherman* or *Swierkiewicz*, but in *Cayman*, the complaint contained only the following nearly incoherent, one-sentence conspiracy allegation in the context of unrelated RICO and breach of contract claims:

> Within the industry, there is a common knowledge that concerted action is contemplated and invited for all transmission companies to uniformly breach contracts with producers with an object and purpose of forcing producers to accept lower prices for natural gas; United has adhered to and participated in this price fixing conspiracy which is illegal *per se* under Section 1 of the Sherman Act.

(Cont'd)

Congress."); *Empress LLC v. City & County of San Francisco*, 419 F.3d 1052, 1056 (9th Cir. 2005) ("the logical conclusion of [*Swierkiewicz*] dictates that a heightened pleading standard should only be applied when the Federal Rules of Civil Procedure so require."); *Andrx v. Pharm., Inc. v. Elan Corp.*, 421 F.3d 1227, 1234-35 (11th Cir. 2005) ("While courts had previously applied a heightened pleading requirement in antitrust cases, this view has subsequently been rejected in favor of applying Rule 8(a)'s notice pleading standard.").

873 F.2d at 1361. Because the claims in *Cayman* centered around an alleged mere breach of contract, the court took a skeptical approach to this incomprehensible conspiracy allegation, which clearly would not have survived the "plausibility" standard articulated by the Second Circuit below. Without citing *Matsushita* – or even beginning to grapple with any of the profound questions that would be raised by its application on a motion to dismiss – the court in *Cayman Exploration* merely observed that the plaintiff had "failed to allege *any* facts which would support an inference that the alleged actions by gas transmission companies would be contrary to their economic interests absent an agreement." *Id.* (emphasis in original). The *Cayman* court's emphasis on the word "any" strongly suggests that had "any" facts supporting an inference of conspiracy been alleged there (as many plainly have been here), the court's ruling would have been entirely different.

Petitioners' treatment of *DM Research* is disturbing because the Second Circuit's opinion painstakingly harmonizes it with its own ruling – going so far as to borrow both its "plausible" phraseology and its "unlikely speculations" language in part from the *DM Research* opinion (Pet. App. 20a, 22a n.6) – yet Petitioners ignore everything that the Second Circuit pointed out about *DM Research*. Pet. 20. Far from conflicting with the decision below, *DM Research* is one of the guiding lights that the Second Circuit thoughtfully followed in phrasing its own opinion. Moreover, even if there were anything in *DM Research* that failed to take *Swierkiewicz* fully into account, that would be only because *DM Research* preceded *Swierkiewicz* by three years. In the wake of *Swierkiewicz*, in *Educadores*, the First Circuit "globally" overruled any of its precedents that might be construed to erect heightened pleading standards not provided for in Rule 9(b), recognizing that such precedents are no longer reconcilable with the "handwriting on the wall" in *Swierkiewicz*. 367 F.3d at 66. *See* n.5, *supra*. Thus, even if something in *DM Research* were arguably at odds with the decision below – although nothing truly is – it would be effectively abrogated by the First Circuit in *Educadores*. Especially after *Educadores*, to profess the existence of a

continuing "circuit conflict" based on *DM Research* is indefensible.

To profess a "circuit conflict" based on *NHL* is preposterous. The *NHL* decision does nothing to support Petitioners' contentions, but affirmatively undermines them. In *NHL*, the Sixth Circuit "conclude[d] that the district court erred in determining that Plaintiffs had failed to allege facts sufficient to support the existence of an agreement between the OHL and the NHL." 419 F.3d at 475-76. The court reached that conclusion based on allegations that the challenged conduct would have been "contrary to their economic self-interest if taken separately" (*id.*) – precisely the sort of allegations made in great detail here. *See* Pet. App. 32a-33a n.15. The Sixth Circuit explicitly rejected an effort to argue (contrary to the plaintiffs' allegations) that such conduct was not in fact contrary to the defendants' independent self-interests, on the basis that "at this stage of the litigation, the Court is required to make all reasonable inferences in favor of Plaintiffs." 419 F.3d at 475-76. The basis on which dismissal of the claims was affirmed in *NHL* is utterly inapposite here, stemming from the court's conclusion that the injuries were caused by a collective bargaining agreement, and thus were subject to a non-statutory antitrust exemption having no conceivable bearing on this case. *Id.* at 474-76.

In short, the supposed "conflict" with other Circuits on which the petition for certiorari relies is nonexistent. In fact, the Second Circuit's decision rests squarely in the center of a consistent stream of case law after *Swierkiewicz*.

III. The Decision Below Does Not Conflict With This Court's Decision In *Dura*.

Lacking any reasonable basis in a circuit conflict for certiorari, Petitioners strain to argue that the decision below conflicts with *Dura*. Pet. 16-17. However, Defendants' contention that *Dura* is germane here is outlandish, both legally and factually.

From a legal standpoint, *Dura* was a securities case governed by the Private Securities Litigation Reform Act

("PSLRA"), which erected a special "heightened pleading" standard for securities cases for which antitrust has no counterpart. The first sentence of *Dura* cites to the heightened "causation" pleading requirement of the PSLRA, 15 U.S.C. § 78u-4(b)(4), and the opinion cites that provision as showing that "Congress has imposed statutory requirements on that private action." 125 S. Ct. at 1631. The opinion points out that "[t]he statutory provision at issue here and the paragraphs that precede it emphasize" a heightened pleading objective, stating that the "causation" section of the PSLRA "expressly imposes on plaintiffs 'the burden of proving' that the defendant's misrepresentations 'caused the loss for which the plaintiff seeks to recover.'" *Id.* at 1633. Only based on such heightened statutory PSLRA requirements does the Court conclude that "*[t]he statute thereby makes clear* Congress' intent to permit private securities fraud actions for recovery where, but only where, plaintiffs adequately allege and prove the traditional elements of causation and loss." *Id.* (emphasis added).

Equally importantly, from a factual standpoint, *Dura* involved the purchase of an asset for investment and resale in the hope of profit at a later date. Its entire factual rationale — concerning the inescapable effect of the second transaction on the existence of any loss to support a claim in the first instance — has no conceivable application to a case like this one, which involves the purchase of services at an inflated price for consumption only, and no possibility of subsequent recoupment of losses through resale. The causation issues that were the entire factual point of *Dura* are completely inapposite, and have no relevance at all to this case.

IV. The Summary Judgment Standards In *Matsushita* Do Not And Should Not Apply To A Motion To Dismiss Under Rule 12(b)(6).

Petitioners also contend that the Second Circuit's decision below conflicts with *Matsushita*. *See* Pet. 14 (arguing that *Matsushita* applies because "the legal standard under which the court evaluates the allegations for legal sufficiency is the same legal standard that the court applies at summary

judgment.") and 21 (contending that the standard to be applied on a motion to dismiss is "the *Monsanto/Matsushita* standard"). The development of summary judgment doctrine under *Matsushita* is the subject of antitrust and procedural literature too voluminous to be fully explicated in this brief. An important recent summary of the doctrine and related developments in jurisprudence – which presents that history in a context that is directly relevant – can be found in Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. Rev. 982, 1029-1034 (June 2003). As shown below, the summary judgment doctrines embodied in this Court's *Matsushita* and *Monsanto* decisions cannot appropriately be applied in the context of a motion to dismiss for at least three basic reasons, in addition to those expressed in *Swierkiewicz* and addressed above.

A. To apply *Matsushita* on a motion to dismiss would violate multiple established pleading standards.

As Professor Miller's article points out, even in the context of summary judgment the *Matsushita* decision provoked strong dissent, in part on the basis that even on summary judgment after full discovery – and even when fully developed expert economic testimony was before the court – the *Matsushita* standard risks invasion of the fact-finding prerogatives of the jury. *Id.* at 1034, 1045-46. Nevertheless, the *Matsushita* standard has become an accepted element of *summary judgment* jurisprudence. But the radical leap urged by Petitioners – to apply that same *Matsushita* analysis to the face of the complaint in the context of a motion to dismiss – is completely unprecedented at the appellate level. To condone that unprecedented leap would be to sanction an extreme example of the "rush to judgment" criticized by Professor Miller in his recent article, in which he states that any trend toward applying *Matsushita* summary judgment standards on a motion to dismiss "not only would be unfortunate, but *would be completely inconsistent with the philosophy and principles of the Federal Rules in general and the pleading rules in particular.*"

Miller, 78 N.Y.U.L. Rev. at 1073-74 (emphasis added). More specifically, it would conflict with the bedrock requirements on a Rule 12(b)(6) motion: (i) to treat Plaintiffs' factual allegations as true,[6] *see Leatherman*, 507 U.S. at 164; (ii) to draw all permissible inferences in the non-moving party's favor;[7]

---

6. For example, the District Court labeled certain of Plaintiffs' factual allegations as "assumptions," even though they are really straightforward allegations of fact. *See, e.g.*, Pet. App. 51a-53a (repeatedly characterizing explicit factual allegations by Plaintiffs about the functioning the relevant marketplace as "assumptions" rather than facts (Pet. App. 51a-52a), and then proceeding to reject them on the basis that they are "undermined" by other considerations having scant support (*id.*), from which the District court then derived "implications" directly at odds with Plaintiffs' factual allegations (Pet. App. 52a-53a)). The Complaint specifically alleges – citing and quoting supporting industry commentary – that the ILEC in an adjacent territory is "best situated" to compete in its neighbors' service areas. Cplt. ¶ 38. In the same vein, it alleges as to "surrounded territories" – which are illustrated by color illustrations attached to the complaint – that "the service of such surrounded territories presents the RBOC serving surrounding territories with an especially attractive business opportunity" and that in competing as a CLEC in such neighboring territories, an ILEC acting as a CLEC would have "substantial competitive advantages." Cplt. ¶¶ 40-41. The District Court swept away all of these factual allegations with a string of *ipse dixits*, asserting *as the indispensable cornerstone of its analysis* that "ILECs who attempt to become CLECs in another ILEC's territory have little competitive advantage over other CLECs" (Pet. App. 52a), that "an ILEC acting as a CLEC is in substantially the same position, and must undertake the same economic calculus, as any other CLEC" (Pet. App. 53a), and that "the ILEC-as-CLEC is not different from any other CLEC with respect to its entry into new markets." Pet. App. 54a. Not only were these central assertions of the District Court's opinion contrary to direct factual allegations in the complaint - as well as being dubious at best as a matter of common sense – but the District Court cited no evidence or authority to support them.

7. Since the gist of *Matsushita* is that a plaintiff on summary judgment must offer evidence that "tends to exclude the possibility" of independent conduct (475 U.S. at 588) – *i.e.*, that the defendant receives the benefit of ambiguous inferences on such a motion – to apply *Matsushita* standards on a motion to dismiss diametrically reverses the established rule that the plaintiff gets the benefit of such inferences on a motion to dismiss. Indeed, this precise point of conflict with conventional pleading standards is one of the bases for the Eleventh Circuit's refusal to accept an argument that

(Cont'd)

and (iii) to entertain dismissal under Rule 12(b)(6) only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).[8]

B. To apply *Matsushita* on a motion to dismiss would impose unrealistic burdens on jurists.

Even apart from the inevitable deviations from bedrock pleading principles that it would spawn, application of a *Matsushita* style "plus factors pleading requirement" on a motion to dismiss also would be imprudent for other practical reasons. The tempering effects at the summary judgment stage of expert testimony and of the availability of a defendant's own internal business analyses – which provide an indispensable "reality check" on a court's sense of what is persuasive in the context of a motion for summary judgment – are entirely absent on a motion to dismiss under Rule 12(b)(6). The District Court quite appropriately expressed at argument that to make such judgments "makes me uncomfortable at the pleading stage" (JA-749) and that the Court would be "much better off after I hear the parties' hired economists making the same arguments you are making now, but with charts and graphs." The District Court further expressed concern that if such an analysis were required "[H]ow do I get there?" (JA-765) and asked whether plaintiffs should be required to annex to these complaints "some study or something saying why" the facts alleged are suspicious. The District Court further articulated the dizzying quandaries that a "plus factor pleading requirement" would impose upon trial courts:

(Cont'd)

challenged behavior was not in fact contrary to the defendants' independent self-interests, as the plaintiffs had alleged that it was, in the *NHL* case, upon which Petitioners and their amici inexplicably rely. 419 F.3d at 475-76. *See* p. 12, *supra*.

8. Petitioners are relatively direct in their attack on this longstanding mandate of *Conley*, italicizing "no set of facts" and arguing that this principle in particular should not govern in antitrust cases. Pet. 2-3.

> [T]he real question is, is the failure to go into another area contrary to the expected economic interest of the defendants such that a reasonable inference would arise that it's strange that they don't and there must therefore be an agreement. That looks awfully like a question of fact. It is an empirical kind of question about how the business works, and I am left wondering what am I to rely on and how am I to analyze these various questions of what it really would take to move into the next door area. Do I read a book on telecommunications? Do I listen to the representations of counsel? Do people need to submit expert reports? Should the pleading contain some kind of expert analysis that explains why this is suspicious?

JA-793. As these comments by the District Court below dramatically illustrated, to extend *Matsushita* analysis to a motion to dismiss would effectively require plaintiffs to engage in complex economic debate and expert analysis in the texts of their complaints, and would require trial courts to engage in solipsistic economics debates with themselves in chambers with only the face of a complaint and their own imagination to guide them — flying directly in the face of this Court's explicit holding, in *Swierkiewicz*, that courts are not to confuse pleading standards with evidentiary requirements.

C. To apply *Matsushita* on a motion to dismiss would unbalance risks of error.

Another way in which application of *Matsushita* to motions to dismiss would be ill-advised stems from the fact that the balance that *Matsushita* strikes is calibrated to an entirely different context, in which the risks from "false positives" are vastly greater than on a motion to dismiss. *See Matsushita*, 475 U.S. at 594 (mistaken inferences of liability "must be balanced against the desire that illegal conspiracies be identified and punished"). As the Court made clear in *Matsushita*, the balance that it strikes between contrasting risks of error is calibrated entirely to the risk of imposing improper

liability for treble damages as a result of possible error by a jury at trial.

By contrast, the much less earthshaking interest at stake on a motion to dismiss is merely whether a claim warrants discovery. In antitrust treble damage actions, mere discovery costs and attorneys' fees pale in comparison to the practical and policy importance of arriving at the right answer as to unlawfulness in the end, and duly taking into account the risk of "false negatives" as to ultimate liability in light of "the desire that illegal conspiracies be identified and punished." *Matsushita*, 475 U.S. at 594. This concern is a particularly serious one in the antitrust context since, as the Second Circuit points out in its opinion, the Sherman Act "contemplates the enforcement of antitrust laws in large measure by private litigants." Pet. App. 29a. *See* n. 4, *supra*.

In process terms, the District Court's application of *Matsushita* standards on a motion to dismiss would equate mere discovery costs and attorneys' fees – which can be managed by a court in other ways in any event through limitations on the discovery process – with the risk that erroneous but massive jury awards of treble damages could "chill" defendants' pro-competitive conduct. To equate such vastly different burdens is to be unreasoningly carried away by today's rhetoric about the "litigation explosion" and "liability crisis."[9] As this Court put it in *Leatherman*, such conflation of mere discovery burdens with the risks of erroneous *liability determinations*, on which summary judgment standards are based, "wrongly equates freedom from liability with immunity from suit." 507 U.S. at 166. By arguing that the *Monsanto* and *Matsushita* standards governing protection against liability through summary judgment should be abruptly transposed into Rule 12 (b)(6) pleading standards, Petitioners attempt to lead this Court into that same basic error.

---

9. *See* Miller, 78 N.Y.U.L. Rev. at 1133 ("It is [*Matsushita's*] improper extension and the lack of any reasoned law-fact analysis by lower federal courts . . . that appear to pose the danger. Unfortunately, today's rhetoric about the 'litigation explosion' [and] a 'liability crisis' . . . may be encouraging district courts and courts of appeals to rely on [*Matsushita*] to justify resorting to pretrial disposition too readily. . . . ").

V. Petitioners Mischaracterize Plaintiffs' Allegations To Erect A "Straw Man" Argument That Only "Innocuous Parallel Conduct" Is Alleged.

Supreme Court Rule 15 admonishes counsel to identify early "any perceived misstatement made in the petition." Petitioners sweepingly mischaracterize the allegations of Plaintiffs' complaint, by claiming that they include only allegations of "innocuous parallel conduct" coupled with a "bare assertion" of conspiracy. As shown below, and as the Second Circuit concluded in its opinion, Plaintiffs' complaint alleges far more.

A. Background

This case concerns the basic structure and functioning of the market for local telephone service in the United States. Prior to the Telecommunications Act of 1996, 110 Stat. 56 (1996), (the "1996 Act"), local telephone service was considered to be the classic "natural monopoly," subject to traditional rate-regulation rather than to competition. As prefatory sections of the 1996 Act make clear, its core purpose was to "provide for an orderly transition from regulated markets to competitive and deregulated telecommunications markets" and to open "all telecommunications markets to competition." To achieve these goals, the 1996 Act required Incumbent Local Exchange Carriers ("ILECs") to permit Competitive Local Exchange Carriers ("CLECs") – including ILECs operating as CLECs – to interconnect with the facilities and equipment of the ILECs at reasonable and nondiscriminatory "wholesale" rates. The realistic expectation was that competition, including but not limited to competition by the ILECs against one another as CLECs, would come to *replace* classic rate-regulation as the primary means for protecting against unnecessarily high prices.

Things have not unfolded as expected. As one Congressman stated in 2002:

> [T]he 1996 Act requires the Bell Companies to allow [CLECs] access to their lines. . . . The Bells frequently refuse to comply with these requests in

> a timely manner. Since 1996, Bell Companies have paid over $2 billion in fines. They clearly believe it is to their advantage to pay penalties for violations of the 1996 Act rather than open up their markets.

JA-387.[10] Likewise, Congressman John Conyers stated in 2001:

> Believing in the promise of the 1996 Act, . . . [CLECs] invested tens of billions of dollars, created 100,000 jobs, and began the enormously difficult work of providing choice. . . . But today, most of those companies have been devastated by the anti-competitive behavior and procrastination of the Bell monopolies. Tens of thousands of newly created jobs disappeared, billions of dollars of value are gone, many CLECs are bankrupt. . . . Instead of seeing the RBOCs eager to enter each others' businesses, there has been a general reluctance to compete.

JA-394. Similarly, Kevin Mooney, CEO of Cincinnati Bell and an ILEC insider, has been quoted as follows in an interview:

> I also feel [the ILECs] don't want to start a cross-border war. If ILEC A buys long-haul company B, then ILEC B is going to have to go after that. I think they feel that they have won the battle. They have beaten back the [CLECs]. . . . Why would they want to start a cross-border battle?

JA-400.

These types of observations have led to several antitrust claims in recent years by CLECs against ILECs under Section 2 of the Sherman Act, alleging unilateral monopolistic conduct. Prior to late 2002, however, there do not appear to have been cases brought against the ILECs alleging horizontal conspiracy

---

10. Citations to evidence contained in the Joint Appendix below are given herein as "JA-___." The District Court considered the full contents of documents referenced in the Complaint, so that more than just the complaint's allegations was considered.

among them pursuant to Section 1 of the Sherman Act.[11] In late 2002, however, a senior executive of Qwest made public comments that astute observers took as evidence that the ILEC's parallel conduct likely are *not* the product of unilateral decisions by each ILEC, but instead the result of a horizontal conspiracy. Cplt. ¶44. Thereafter, based not only upon this event but on other facts as well, Congressman Conyers – who is the top Democrat on both the House Judiciary Committee and the House committee that oversees telecommunications issues – formally wrote (along with Congressman Lofgren) to Attorney General John Ashcroft on Dec. 18, 2002, demanding that an investigation be commenced by the Department of Justice ("DOJ") into the same apparent horizontal conspiracy alleged in this action, described below. This action was brought in response to the emergence of these and other strong grounds for believing a horizontal conspiracy may exist among the Defendants, to vindicate vitally affected public interests.

B. Nature of the Case

In this case, Plaintiffs allege that Defendants have agreed and conspired, in a *per se* violation of Section 1 of the Sherman Act, to allocate geographic markets to one another, to refrain from out-of-region local competition, and to exclude competitors from in-region local telephone service markets. Two elements of the alleged conspiracy can be separately viewed for didactic purposes, but mutually reinforce one another. *First*, Defendants are alleged to have agreed not to compete as CLECs in one another's ILEC territories. *Second*, Defendants are alleged to have agreed to engage in specific, parallel patterns of behavior in each of their ILEC territories, calculated to prevent CLECs other than Defendants from succeeding in competing with the ILECs as CLECs. Although the two elements of the alleged conspiracy are most readily

11. Nothing in the Supreme Court's recent decision in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko LLP*, 124 S. Ct. 872 (2004) ("*Trinko*"), undermines the *per se* liability that would follow under Section 1 of the Sherman Act if the Defendants are proven to have engaged in a horizontal conspiracy to allocate geographic markets to one another, as alleged in this case.

understood when presented as separate elements, they are alleged in the Complaint as parts of a single, interrelated conspiracy and pattern of joint conduct.[12]

C. Many Specifically Alleged Facts Suggest Conspiracy.

Certain aspects of the depicted territorial configurations of ILEC territories are important to an understanding of the reasons for the Second Circuit's decision below, which were mapped in detail in exhibits to the complaint in this case ("Cplt."). In particular, in part because Defendant Verizon acquired geographically dispersed assets that had been owned not by AT&T but by its historical competitors, Verizon has a great many small territories in which it is the ILEC which are, in many instances, completely surrounded by territories in which another Defendant is the ILEC. ILECs who are advertising and marketing in the geographic territory surrounding such "islands" of local service obviously would have a significant advantage in competing within such territories as a CLEC - stemming, *inter alia*, from such considerations as the exposure of customers within such surrounded territories to television and newspaper advertising for which the surrounding ILEC is paying in any event in order to maintain its market position in the surrounding territory. Informed industry commentary, which is quoted in the complaint, plainly states that such *neighboring* ILECs "are best situated to" compete as CLECs (Cplt. ¶ 38) and the Complaint resoundingly pleads as fact that "the service of such surrounded territories presents the [ILEC] serving surrounding territories with an especially attractive business opportunity" (Cplt. ¶ 40), which the Complaint particularizes as to each Defendant. Cplt. ¶ 41.

The Complaint alleges – citing supporting observations by informed observers – that despite these especially attractive business opportunities, the Defendant ILECs oddly

---

12. *See Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) (admonishing against "tightly compartmentalizing the various factual components [of an alleged conspiracy] and wiping the slate clean after scrutiny of each.").

have not sought to compete with one another as CLECs, even in these wholly surrounded and especially attractive territories – *i.e.*, that they have not pursued their individual competitive interests. This refusal of the ILECs to compete with one another is anomalous for numerous reasons, including that: (i) it does not square with Defendants' own complaints to Congress that the rates that a CLEC is required to pay an ILEC to lease its network components are below-cost and unfair (Cplt. ¶ 39; *see also* Pet. App. 5a-6a); (ii) it is contrary to the explicitly pleaded expectations of Congress when the Telecommunications Act was passed (Cplt. ¶ 38); (iii) it is contrary to "public pledges" given by Petitioners, at the time of the 1996 act, "that they would seek to advance the goals of competition by entering local telecommunications markets outside their region" (JA-376); and (iv) it is contrary to the demonstrated investment expectations of sophisticated CLEC investors, who invested "tens of billions of dollars" in the belief that competition as a CLEC was a potentially viable business model in the wake of the Telecommunications Act. In light of so many compelling facts, and treating the Complaint's reasonable allegations as true, the District Court was right to accept for pleading purposes the allegation that Defendants' stark and "very apparent non-competition policy in each others' markets" (Cplt. ¶ 45) is *not* the result of pursuit by Defendants of what would have been their individual, competitive financial interests in the absence of a conspiracy.

At the very minimum it is *plausible* to attribute this odd phenomenon to unlawful conspiracy among the Defendants, and the Complaint unambiguously does so. The plausibility of the Complaint's factual allegation that Defendants' policy of non-competition with one another is attributable to conspiracy finds support even in the actions of members of Congress, who would not lightly have written to the Attorney General to demand an investigation into the existence of collusion, as is specifically alleged in the Complaint. Cplt. ¶ 45. Moreover, the proposition that there is a disconnect between individual profit motives and the actuating springs of Defendants' relevant conduct finds telling support in the specifically pleaded public statement of Mr. Notebaert, an

executive office of one of the Defendants, that competition by an ILEC as a CLEC in another ILEC's territory *"might be a good way to turn a quick dollar* but that doesn't make it *right*." Cplt. ¶ 42 (emphasis supplied). Unsurprisingly, knowledgeable industry commentators publicly took this statement, as specifically alleged in the Complaint, as "evidence of potential collusion," Cplt. ¶ 44, and the Complaint pleads it as such.

Various other facts about the local telephone industry also are specifically pleaded, which "make a market allocation agreement feasible" in the specific market at hand, making it unusually practical to avoid detection of a conspiracy (Cplt. ¶ 48) and making any one competitor's noncompliance with the alleged conspiratorial agreement likely to be detected immediately by others and thereby making "a territorial allocation agreement among the Defendants more feasible, more readily enforceable, and more probable." Cplt. ¶ 49. Ample opportunity to conspire also has been specifically alleged by reason of the fact that the Defendants already are communicating with one another frequently regarding issues of common interest and concern through a "myriad of organizations." Cplt. ¶ 46. All of those factual allegations lend still further support to the Second Circuit's conclusion that an inference of conspiracy from the pleaded facts is a "plausible" one.

In short, the nature of the industry in question is such, in important ways that are pleaded in detail in the Complaint, that an inference of conspiracy is much more reasonable and natural than it might be in some other industries, in which market allocation would be either easier to detect from the standpoint of outside authorities or more difficult to enforce from the standpoint of its participants. In many cases, including this Court's decision in *Matsushita* itself, great significance has been attached to such facts. *See Matsushita*, 475 U.S. at 589-93. Plaintiffs also specifically allege that conspiracy among the Defendants *facilitated attainment* of their respective objectives of excluding CLECs, which has been sufficient to show the "plus factor" of "common motive" at

least since *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939).

The Complaint in this case does far more than make a "bare bones" assertion of conspiracy – as Petitioners inaccurately assert – but fully identifies "the relevant product market, the co-conspirators, and describe the nature and effects of the alleged conspiracy." *Granite Partners, L.P. v. Bear, Stearns & Co.*, 58 F. Supp. 2d 228, 238 (S.D.N.Y. 1999). Indeed, Plaintiffs' allegations closely parallel facts that survived even *a motion for summary judgment*, in Judge Posner's decision in *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651 (7th Cir. 2002). In that case the industry structure supported an inference of potential conspiracy even on summary judgment because "[t]he five original defendants . . . accounted during the period of the alleged conspiracy for 90 percent" of the market, *id.* at 656, while in this case, the four defendants are specifically alleged to have *more than* 90 percent of the market in the lower 48 states. Cplt. ¶ 48. In *High Fructose*, this made a conspiracy easy to police because "elaborate communications . . . would not have been necessary", 295 F.3d at 656; and the same is alleged in closely matching detail here. Cplt. ¶ 48-49. And perhaps most importantly in *High Fructose*, heavy weight was attached by Judge Posner to the fact that "there is evidence that the defendants were not competing," 295 F.3d at 661, and the same is resoundingly alleged here. Cplt. ¶¶ 39-40, 42, 45.

Even if summary judgment standards were applicable – as outlandish as that would be under this Court's precedents in *Swierkiewiecz* and *Leatherman* – this complaint still would pass muster in light of the extensive allegations made in the complaint. In cases of parallel conduct, Petitioners argue that a plaintiff must present evidence that tends to exclude the possibility that the alleged conspirators acted independently – *i.e.*, so-called "plus factors." Pet. 12-13. But the complaint in this case alleges precisely such "plus factors", specifically alleging – with the help of detailed illustrations – that Defendants' failure to compete "would be anomalous in the absence of an agreement among the RBOCs not to compete with one another" (Cplt. ¶¶ 40-41), and that "Defendants had

compelling common motivations to include in their unlawful horizontal agreement an agreement that each of them would engage in a course of concerted conduct calculated to prevent effective competition." Cplt. ¶ 50.

Plaintiffs have clearly alleged the widely recognized "plus factor" that Defendants' activities would have been against their own individual business interests absent an illicit agreement. *Apex Oil Co. v. Di Mauro*, 822 F.2d 246, 257 (2d Cir. 1987); *In re Nasdaq Market-Makers Antitrust Litig.*, 894 F. Supp. 703, 713-14 (S.D.N.Y. 1995). Richard Notebaert of Qwest has made public statements that "[e]ven though his company could use a new revenue stream . . . he would not consider competing against his old firm for phone customers in the Chicago area" and that "*it would be fundamentally wrong* to compete for Ameritech's residential customers *even though Qwest could profit from the service.*" Jon Van, *Ameritech Customers Off Limits: Notebaert*, Chicago Tribune, Oct. 31, 2002 (emphasis added). If Plaintiffs are given the benefit of all reasonable inferences – as they must be on a motion to dismiss – Notebaert's statements, which are specifically quoted in Plaintiffs' complaint (Cplt. ¶ 42), clearly support a conclusion that Defendants were acting against their individual financial interests (absent a conspiracy) in staying out of one another's territories. Indeed, no less than the senior Democrat of the House committee that oversees telecommunications matters evidently perceived Notebaert's statements in just that way, inasmuch as it was one of the considerations that prompted him to request a formal investigation into the matter as alleged in the Complaint. Cplt. ¶ 45. It cannot seriously be maintained that such a formal reactions to Notebaert's statements – not only by Congressmen Conyers and Lofgren but by other knowledgeable observers as well (Cplt. ¶ 44) – was implausible as a matter of law on a motion to dismiss.

Furthermore, as shown below, each of the two main elements of Defendants' interrelated and unitary conspiracy has been alleged with far more than any required level of detail.

D. Plaintiffs have sufficiently alleged facts suggesting conspiracy to allocate markets and refrain from out-of-region local competition.

The Complaint provides a wealth of detail about the principal element of the alleged conspiracy which is far more than is necessary to describe its nature, participants, and effects. Not only does the Complaint allege that Defendants agreed to refrain from engaging in meaningful head-to-head competition in each other's markets, but it also identifies specific instances of market allocation and conduct contrary to the interests of individual Defendants in the absence of an agreement. Cplt. ¶¶ 37-41. The Complaint identifies and maps numerous geographic regions in which the configuration of Defendants' ILEC territories provides a surrounding ILEC with substantial advantages with which to compete as a CLEC, supporting a reasonable inference that the failure to compete in such territories is due to something (*i.e.*, conspiracy) other than pursuit of the surrounding ILEC's individual interest. Cplt. ¶¶ 40-41. Further, Plaintiffs allege that the four Defendants, who together account for at least ninety percent of the market for local telephone services within the 48 contiguous states, did not need frequent communications to allocate markets successfully. Cplt. ¶ 48. Instead, "[i]f one of the Defendants had broken ranks and commenced competition in another's territory, the others quickly would have discovered that fact." Cplt. ¶ 49. "The likely immediacy of such discovery makes a territorial allocation agreement among the Defendants more feasible, more readily enforceable, and more probable." *Id.* These are precisely the type of circumstantial considerations, for example, that Judge Posner relied upon in his denial of summary judgment in *High Fructose* (discussed above). To require more than this to be pleaded would be to require that plaintiffs prove their case conclusively and engage in extensive "law and economics" debate, or otherwise prove their case in the complaint. For nearly fifty years, at least since this Court's decision in (1957) *Conley*, it has been clear

that the rules promulgated by this Court in 1938 mean what they say, and that no such byzantine paper exercises are necessary to state a claim consistently with Rule 12(b)(6).

E. Plaintiffs also have sufficiently alleged facts suggesting conspiracy to restrain in-region competition from CLECs.

Plaintiffs also allege in detail that Defendants shared a common motivation to agree to prevent effective competition from CLECs. Allowing successful competitive entry by a CLEC in one territory would have "revealed the degree to which competitive entry by CLECs would have been successful in other territories in the absence of such conduct." Cplt. ¶ 50. Also, successful competitive entry into a Defendants' territory would have encouraged other CLECs to attempt to enter other territories controlled by Defendants. *Id.* Thus, Defendants had a compelling common motivation to block CLECs' access to their markets, protecting one another from competition from CLECs. *Id.* The Complaint sets forth a dozen detailed forms of parallel conduct in which all Defendants engaged in order to prevent in-region competition from CLECs. That detail provides Defendants with exquisite notice of Plaintiffs' claims, which is far more than the most that could be required under *Swierkiewicz*. In sum, Plaintiffs have far more than fulfilled the notice pleading requirement articulated in Rule 8(a) and forcefully applied by the Court in *Swierkiewicz*, making both direct and inferential allegations of an antitrust conspiracy, providing the time period during which it operated, identifying its participants, and describing its effects. To require more would be to abandon the principles of notice pleading articulated by this Court repeatedly in *Swierkiewicz*, *Leatherman*, and *Conley*.

VI. Petitioners Disagree Mainly With The Second Circuit's Conclusion That Plaintiffs' Extensive Allegations Of Fact Make A Conspiracy Plausible, Which Is Not An Issue Appropriate For Certiorari.

Under Supreme Court Rule 10, certiorari should rarely be granted "when the asserted error consists of erroneous factual findings. . . ." Certiorari should not be granted in this case because at bottom, Petitioners' real quarrel with the decision below lies in their disagreement with the Second Circuit's conclusion, based on the extensive and detailed allegations outlined above, that the detailed allegations referenced above provide a "sufficient factual predicate" on the basis of which to conclude that the allegation of conspiracy is "plausible." Both elements – the pleading of a "factual predicate" and the "plausibility" of an inference of conspiracy from that predicate – are clearly required by the Second Circuit's opinion, and were found by the Second Circuit to be amply satisfied in this case.

The Second Circuit's opinion holds that an antitrust claimant "must allege . . . a sufficient supporting factual predicate on which that allegation [of conspiracy] is based." Pet. App. 25a. *See also* Pet. App. 23a (a plaintiff must allege a conspiracy "together with the factual predicate upon which those assertions are made"). Summarizing in detail the "several factual bases for [Plaintiffs'] far-reaching claims of a two-pronged antitrust conspiracy" (Pet. App. 5a-8a), the Second Circuit concludes that a clear "factual predicate" for an inference of conspiracy has been alleged. By contrast, Petitioners broadly assert that all that is alleged is "innocuous" conduct coupled with a "bald assertion" of conspiracy (Pet. 1, 11), thereby turning a blind eye to the extensive supporting facts actually pleaded by the Plaintiffs, and essentially asking this Court to disagree with the Second Circuit about the extent of the allegations that were made. Under Supreme Court Rule 10, such a disagreement with a Circuit Court's carefully-considered evaluation of detailed facts alleged in a complaint is not a satisfactory basis for a writ of certiorari.

As to how convincing such facts must be to survive a motion to dismiss, the Second Circuit held that "[t]he factual predicate that is pleaded does need to include conspiracy among the realm of plausible possibilities", Pet. App. 19a, and that "the pleaded factual predicate must include conspiracy among the realm of 'plausible' possibilities in order to survive a motion to dismiss." Pet. App. 25a. Applying that standard, the Second Circuit examined some of the specific and detailed allegations made in Plaintiffs' complaint (Pet. App. 30a-32a), and concluded that they amply satisfy the "plausibility" standard that it has articulated. Pet. App. 33a. Indeed, as the Second Circuit opinion points out, Plaintiffs have not only alleged sufficient facts to make an inference of conspiracy "plausible", *but have alleged plus factors of the type that conventionally can defeat summary judgment*, making it "particularly difficult to conclude that the allegations contained in the complaint are insufficient to state a claim." Pet. App. 32a-33a n.15. By contrast, Petitioners simply pretend that nothing more than "parallel conduct" has been alleged (Pet. 13-14), thereby essentially asking this Court to disagree with the Second Circuit's conclusion that the detailed supporting facts alleged in this case make an inference of conspiracy "plausible." Such a disagreement with a Circuit Court's thoroughly-considered judgment about what is a reasonable inference from specific alleged facts is no basis for a writ of certiorari.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

J. DOUGLAS RICHARDS
Counsel of Record
MICHAEL M. BUCHMAN
MILBERG WEISS BERSHAD
& SCHULMAN LLP
One Pennsylvania Plaza
New York, NY 10119-0165
(212) 594-5300

JOSEPH H. MELTZER
SCHIFFRIN & BARROWAY, LLP
Three Bala Plaza East
Suite 400
Bala Cynwyd, PA 19004
(610) 667-7706

Attorneys for Respondents

No. 05-1126

FILED
MAY 30 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
Supreme Court of the United States

BELL ATLANTIC CORPORATION, *ET AL.*,
Petitioners,
v.
WILLIAM TWOMBLY, *ET AL.*, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

STEPHEN M. SHAPIRO
KENNETH S. GELLER
RICHARD J. FAVRETTO
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000
Counsel for BellSouth Corporation

SETH P. WAXMAN
WILLIAM J. KOLASKY
WILMER CUTLER PICKERING HALE AND DORR LLP
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6357
Counsel for Qwest Communications International Inc.

MICHAEL K. KELLOGG
Counsel of Record
MARK C. HANSEN
SEAN A. LEV
AARON M. PANNER
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
Counsel for AT&T Inc. (formerly SBC Communications Inc.)

RICHARD G. TARANTO
FARR & TARANTO
1220 19th Street, N.W., Suite 800
Washington, D.C. 20036
(202) 775-0184
Counsel for Verizon Communications Inc.

May 30, 2006

(additional counsel listed on inside cover)

LAURA J. COLEMAN
J. HENRY WALKER
MARC W.F. GALONSKY
ASHLEY WATSON
BELLSOUTH CORPORATION
1155 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 249-2720
Counsel for BellSouth Corporation

JOHN THORNE
PAUL J. LARKIN, JR.
DAVID E. WHEELER
ROBERT J. ZASTROW
VERIZON COMMUNICATIONS INC.
1515 North Courthouse Road
Arlington, Virginia 22201
(703) 351-3900

DAN K. WEBB
CHARLES B. MOLSTER III
WINSTON & STRAWN LLP
35 W. Wacker Drive
Chicago, Illinois 60601
(312) 558-5856
Counsel for Verizon Communications Inc. (successor-in-interest to Bell Atlantic Corporation)

CYNTHIA P. DELANEY
QWEST COMMUNICATIONS INTERNATIONAL INC.
1801 California Street
Denver, Colorado 80202
(303) 383-6790

TIMOTHY BEYER
BROWNSTEIN HYATT & FARBER, P.C.
410 17th Street, 22nd Floor
Denver, Colorado 80202
(303) 223-1116
Counsel for Qwest Communications International Inc.

JAVIER AGUILAR
WILLIAM M. SCHUR
AT&T SERVICES, INC.
175 E. Houston Street, 4th Floor
San Antonio, Texas 78205
(210) 351-3409
Counsel for AT&T Inc. (formerly SBC Communications Inc.)

CORPORATE DISCLOSURE STATEMENTS

Petitioners' Statements pursuant to Rule 29.6 were set forth at page iii of the petition for a writ of certiorari, and there are no amendments to those Statements.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENTS i

TABLE OF AUTHORITIES iii

ARGUMENT:

A. The Petition Cleanly Presents an Important Question Concerning Proper Pleading Standards and Their Application to Claims of Conspiracy Under Section 1 of the Sherman Act 2

B. The Second Circuit's Decision Conflicts with Rule 8(a), This Court's Precedents, and Decisions of Other Courts of Appeals 4

C. The Second Circuit Decision Is Wrong on the Merits 8

D. The Case Is Important 10

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983) 1

Cayman Exploration Corp. v. United Gas Pipe Line Co., 873 F.2d 1357 (10th Cir. 1989) 7, 8

DM Research, Inc. v. College of Am. Pathologists, 170 F.3d 53 (1st Cir. 1999) 7

Dura Pharms., Inc. v. Broudo, 544 U.S. 336 (2005) 1, 7

Illinois Tool Works Inc. v. Independent Ink, Inc., 126 S. Ct. 1281 (2006) 2

Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993) 6

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 1, 3, 4, 5, 6, 8

Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984) 1, 3, 4

NHL Players Ass'n v. Plymouth Whalers Hockey Club, 419 F.3d 462 (6th Cir. 2005) 8

Olympia Equip. Leasing Co. v. Western Union Tel. Co., 797 F.2d 370 (7th Cir. 1986) 6

Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002) 1, 6, 7

Tamoxifen Citrate Antitrust Litig., In re, 429 F.3d 370 (2d Cir. 2005) 2, 3

Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) 9

ADMINISTRATIVE DECISIONS

Memorandum Opinion and Order, *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433 (2005), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-184A1.pdf 9

STATUTES AND RULES

Sherman Act, 15 U.S.C. §§ 1 *et seq.*:

§ 1, 15 U.S.C. § 1 ..... 2, 3, 4, 9

§ 2, 15 U.S.C. § 2 9

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56:

47 U.S.C. § 271 9

Fed. R. Civ. P.:

Rule 8 4

Rule 8(a) 4

Rule 12 10

Rule 12(b)(6) 6

ADMINISTRATIVE MATERIALS

Opinion of the California Attorney General on Competitive Effects of Proposed Merger of Verizon and MCI, *Joint Application of Verizon and MCI to Transfer Control*, Application No. 05-04-020 (Cal. Pub. Utils. Comm'n filed Sept. 16, 2005), *available at* http://www.cpuc.ca.gov/WORD_PDF/NEWSRELEASE/49697.PDF 9

OTHER MATERIALS

Brief for the United States and the Federal Trade Commission as *Amici Curiae*, *Empagran, S.A. v. F. Hoffmann-Laroche, Ltd.*, No. 01-7115 (D.C. Cir. filed Feb. 16, 2005) 6

Cecile Kohrs Lindell, TechConfidential (title pending; to be published June 26, 2006) 4

Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. Rev. 982 (2003) 5

Respondents' brief in opposition puts the question presented in stark relief. Respondents recognize that the Second Circuit expressly adopted a standard requiring a district court to deny a motion to dismiss even where the complaint fails to plead facts that, if proved, would permit the plaintiff to obtain relief under the governing substantive legal standards applicable to the claim. Respondents consider that a virtue of the decision below; petitioners do not.

The Second Circuit, misreading *Swierkiewicz*, held that allegations of parallel conduct *always* survive a motion to dismiss, as long as the plaintiff alleges that the parallel conduct is the product of a conspiracy, unless "there is *no set of facts* that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence." Pet. App. 25a (emphasis added). At most, the Second Circuit said, conspiracy must be one "plausible" possibility among others equally or even more likely. *Id.*

Respondents do not dispute that such allegations would not support relief or even permit a trial under the governing substantive law of *Matsushita* and *Monsanto*, which requires facts that tend to exclude the possibility of independent, non-collusive action. Nor do respondents make any attempt to grapple with this Court's recent, post-*Swierkiewicz* affirmation in *Dura Pharmaceuticals* that underlying liability rules dictate the allegations required to survive a motion to dismiss. Nor do respondents even mention this Court's admonition in *Associated General Contractors* that a court, in ruling on a motion to dismiss, may not assume a plaintiff may be able to prove facts not alleged in the complaint.

Respondents do not gainsay the importance of the question presented. To the contrary, they insist that the Second Circuit's open invitation to meritless suits – and massive discovery – somehow promotes effective enforcement of the antitrust laws. But, far from defending its ruling on any such policy ground, the Second Circuit invited this Court to review its decision to alleviate the "deleterious effect" of its rule on law-abiding businesses. Pet. App. 30a. The last time a court

of appeals invited this Court's review in an antitrust case, the Court accepted the invitation and reversed unanimously. *See Illinois Tool Works Inc. v. Independent Ink, Inc.*, 126 S. Ct. 1281 (2006). The Court should accept the invitation here as well.

ARGUMENT

A. The Petition Cleanly Presents an Important Question Concerning Proper Pleading Standards and Their Application to Claims of Conspiracy Under Section 1 of the Sherman Act

1. Respondents accuse petitioners of "mischaracteriz[ing]" the Second Circuit's decision and setting up a "straw man." Opp. at 1. They claim that the court below did not hold that allegations of parallel conduct will always survive a motion to dismiss; rather, the complaint must allege "*facts* . . . which make an inference of conspiracy . . . a 'plausible' one." *Id.* But the Second Circuit held – though respondents do not acknowledge, much less defend, the holding – that any claim based on parallel conduct *is* "plausible" unless "there is *no set of facts* that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence." Pet. App. 25a (emphasis added). It is nearly always *possible* that parties agreed – even when it is more likely that the parallel conduct reflects independent responses to comparable circumstances. *See* Pet. 14 & n.3. The Second Circuit's standard thus permits a plaintiff to plead a claim under Section 1 by alleging otherwise lawful parallel conduct and affixing a "conspiracy" label. This is no "straw man"; it is a holding of tremendous practical importance – as the eight amicus briefs filed in support of the petition attest.[1]

---

[1] Respondents point to *In re Tamoxifen Citrate Antitrust Litigation*, 429 F.3d 370, 402 (2d Cir. 2005), as evidence that the Second Circuit's standard is "significantly more demanding" (Opp. at 1-2) than petitioners have suggested. *Tamoxifen* provides no comfort. In that case, the Court held that a settlement agreement between two drug manufacturers – the

Moreover, even if respondents were correct that the Second Circuit's "plausibility" standard requires more than allegations of innocuous parallel conduct coupled with a "conspiracy" label – and respondents identify no parallel conduct allegation that could not support a plausible claim of conspiracy – the Second Circuit's decision still merits review, because the court refused to apply the substantive rules that govern conspiracy claims on a motion to dismiss. Under *Matsushita* and *Monsanto*, where the existence of an agreement is at issue, plaintiffs must point to facts that "tend[] to exclude" the possibility of *independent* action. *See Matsushita*, 475 U.S. at 588. As respondents' opposition makes clear, the question whether the Second Circuit was right to reject that standard in evaluating the legal sufficiency of the complaint is squarely presented. *See* Opp. at 13-18.

2. Any suggestion that the Second Circuit's decision turned, not on the legal question presented, but on an "evaluation of detailed facts alleged," Opp. at 29, cannot be squared with the opinion below. The Second Circuit reversed the district court because it "disagree[d] with the *standard*" that the lower court had applied. Pet. App. 3a (emphasis added). Accordingly, the Second Circuit never took issue with the district court's carefully explained conclusion that the complaint's allegations were insufficient to support a claim of conspiracy in violation of Section 1. Instead, the Second Circuit dismissed such an analysis as legally inappropriate on a motion to dismiss. *See id.* at 10a-11a.

---

existence of which was not at issue – was not an unlawful restraint of trade under Section 1. In the passage respondents cite, the court merely noted that one provision of that agreement could not be plausibly construed as reflecting "a separate agreement . . . to protect the defendants from competition," in light of the fact that the provision at issue would not have had the supposed exclusionary effect "in light of the law at the time." 429 F.3d at 402. This passage has nothing to do with what facts must be pleaded to establish the existence of a conspiracy, let alone a conspiracy based on allegations of parallel conduct.

B. The Second Circuit's Decision Conflicts with Rule 8(a), This Court's Precedents, and Decisions of Other Courts of Appeals

1. Rule 8(a) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). That "showing" depends on allegations of fact – not legal conclusions. And the *legal sufficiency* of the facts alleged must be evaluated in light of the substantive standards that govern the claim. To require a plaintiff to plead facts that, if true, would support a finding of liability is not to require "heightened pleading," Opp. at 7, but to apply Rule 8 as it is written.

Here, the only facts alleged to support plaintiffs' claim of conspiracy under Section 1 are that defendants failed to comply with regulatory obligations benefiting competitors and did not meaningfully compete with one another. Whether defendants *did*, in fact, fail to comply with regulatory obligations (or whether they invested billions in regulatory compliance efforts) and whether defendants *did*, in fact, refrain from competition (or whether they compete vigorously in wireless, enterprise, and other markets where competition is economic) are factual matters outside the scope of inquiry on a motion to dismiss. But, whether plaintiffs' allegations, taken as true, establish Section 1 liability depends on the legal standards of Section 1. That determination must be made, and was properly made by the district court, at the motion to dismiss stage.

Under this Court's precedents, allegations of parallel conduct do not support a claim of conspiracy unless they "'tend[] to exclude the possibility' that the alleged conspirators acted independently." *Matsushita*, 475 U.S. at 588 (quoting *Monsanto*, 465 U.S. at 764).[2] The district court

---

[2] FTC Commissioner Rosch has sharply criticized the decision below, noting that "[t]he core conduct in *Twombly* is parallel conduct by competitors . . . that cannot be treated as conspiratorial." Cecile Kohrs Lindell, TechConfidential (title pending; to be published June 26, 2006). Indeed, as amici economists make clear, parallel conduct is not just

properly evaluated the complaint's allegations against this legal standard; the Second Circuit refused to do so.

2. Respondents offer three justifications for the Second Circuit's refusal to honor *Matsushita*. *First*, they contend that the case applies only on summary judgment. But the Court in *Matsushita* "was basing its decision on *underlying substantive antitrust law* rather than employing a new summary judgment standard." Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. Rev. 982, 1030 (2003) (emphasis added). This Court's holding that parallel conduct, even if proven, will not support liability for conspiracy (absent facts that tend to rule out independent action) likewise applies in evaluating the factual allegations of a complaint that, like this one, bases its conclusion of "conspiracy" on alleged parallel conduct.

Second, respondents argue that judges cannot intelligently evaluate the factual allegations of a complaint without "expert testimony" and "a defendant's own internal business analyses." Opp. at 16.[3] That may be true in some cases, and a district judge may err on the side of allowing those cases to proceed, pending development of an evidentiary record. But, as explained below and in the petition (at 21-26), this case was not even close – the complaint's allegations not only are entirely consistent with wholly *independent* business conduct, but also affirmatively indicate that the conduct was in defendants' individual self-interest absent conspiracy.

Third, respondents argue that petitioners undervalue the importance of antitrust enforcement and overvalue the costs

---

innocent, it is generally efficient and pro-competitive. *See* Brief of Economists at 7-9.

[3] Ironically, respondents quote extensively from Judge Lynch's questions to petitioners' counsel probing whether the court had enough information to determine that the complaint failed to satisfy the *Matsushita* standard. Respondents ignore the court's affirmative answer and accompanying explanation, which appear in the appendix to the petition at 45a-58a.

of unmeritorious litigation.[4] The short answer is that this Court struck a balance in *Matsushita*, and respondents' disparagement of that case (*see* Opp. at 14) does not justify the Second Circuit's refusal to apply it. Furthermore, there is no empirical basis for the claim that private suits and discovery fishing expeditions lead to detection of secret conspiracies – to the contrary, according to the Department of Justice, "the vast majority of private suits against cartels[] are follow-on actions triggered by the government's exposure of a cartel." Brief for the United States and the Federal Trade Commission as *Amici Curiae* at 23, *Empagran, S.A. v. F. Hoffmann-Laroche, Ltd.*, No. 01-7115 (D.C. Cir. filed Feb. 16, 2005). By contrast, the scholarly literature – and the testimony of amici – amply documents the burden that discovery imposes, and the resultant pressures for settlement, even in frivolous cases. *See, e.g.*, Brief of MasterCard Int'l Inc., *et al.*, at 4-7.

3. Respondents argue that, if the claim of discrimination in *Swierkiewicz* was sufficient, so too must be their claim of conspiracy. Opp. at 7-8. But there was no dispute that the plaintiff in *Swierkiewicz* (who was Hungarian and 53 years old) alleged all the *conduct* that was required to state a claim – defendant (who was French) fired him and replaced him with another Frenchman who was much younger. The disputed element was discriminatory motive; plaintiff alleged that as well and was given the chance to prove it directly.

Here, by contrast, the *conduct* that plaintiffs have alleged – in the absence of an agreement among the defendants – is lawful even if defendants shared a motive to insulate themselves from competition. *See Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 379 (7th Cir. 1986). What is missing from the complaint is not sufficient basis for

---

[4] Any notion that petitioners are arguing for "'immunity from suit'" in this context, Opp. at 18 (quoting *Leatherman*, 507 U.S. at 166), is preposterous. Contrary to respondents' suggestion, merely filing a complaint does not automatically entitle a plaintiff to proceed to summary judgment. Dismissal of complaints that fail to allege the elements of any claim is mandated under Rule 12(b)(6); it is not an "immunity."

inferring anticompetitive motive (which is not required and hardly relevant), but necessary factual allegations indicative of agreement. Indeed, even plaintiffs do not argue that their naked assertion of "conspiracy" fills the gap. *See* Pet. 17-18. Unable to allege any direct facts to support a claim of conspiracy, plaintiffs instead sought to make out a claim by alleging parallel conduct and asking the district court to accept the inference that the conduct was inconsistent with independent, self-interested behavior. *See* Pet. 5-6. The district court carefully reviewed all allegations in the complaint and drew all permissible inferences in plaintiffs' favor, but still correctly found that the complaint utterly failed to satisfy the governing legal standard.

4. Respondents argue that *Dura Pharmaceuticals* is inapplicable here because that case reflected "a heightened pleading objective." Opp. at 13. *Dura* cannot be so confined, because the Court explicitly premised its holding on the assumption that "neither the Rules nor the securities statutes impose any special further requirement in respect to the pleading of proximate causation or economic loss." 544 U.S. at 346. This Court's determination that the *Dura* plaintiffs were required (but had failed) to allege economic loss and proximate cause did not reflect any "heightened pleading" requirement; the Court simply insisted that plaintiffs plead all of the substantive elements of their claim. The Second Circuit's test – which defers until summary judgment application of the governing legal standard – cannot be reconciled with this fundamental pleading requirement.

5. Respondents seek to deflect attention from the split of authority among the lower courts by arguing, in effect, that cases decided before *Swierkiewicz* should not count. As they conceded below, however, "*Swierkiewicz* did not change the law of pleading." Pet. App. 44a. *Cayman* remains good law in the Tenth Circuit, and *DM Research* in the First.[5]

---

[5] Respondents rebuke petitioners for their "disturbing" treatment of *DM Research*, arguing that the case was one of the "guiding lights" of the

Furthermore, respondents cannot contest that the standards applied in *Cayman* and by the Sixth Circuit in *NHL Players Association* conflict with the standard applied below. In each case, the courts demanded that a plaintiff plead facts tending to show that the alleged conduct would be contrary to self-interest *absent* agreement. This is *Matsushita* in a nutshell, and *NHL Players Association* explicitly relied on *Matsushita*'s circuit court progeny. The divergent standards in the circuits add to the urgency for review.

C. The Second Circuit Decision Is Wrong on the Merits

Respondents devote nearly one-third of their opposition to the argument that their complaint satisfied the pleading standard that they insist should not apply. *See* Opp. at 19-28. But respondents' arguments provide no basis to question the district court's conclusion – which the Second Circuit found it unnecessary to consider – that the alleged parallel conduct does not tend to exclude the possibility of independent action.

To the contrary, respondents' arguments provide further support for the conclusion that the alleged parallel conduct is entirely explicable as a matter of self-interest, agreement or no. Respondents quote a "Congressman" asserting that the "Bell Companies . . . clearly believe *it is to their advantage* to pay penalties for violations of the 1996 Act rather than open up their markets." Opp. at 19-20 (emphasis added). Even granting the assertion for the sake of argument, the Bell Companies' evaluation of their own "advantage" nowhere turns (either in the statement or as a matter of logic) on other incumbent providers' decision to follow the same path.

Second Circuit's opinion. Opp. at 11. Whether or not the Second Circuit sought to cloak itself in the legitimacy of Judge Boudin's analysis, the two opinions are irreconcilable. The First Circuit applied the analytical tools of an "antitrust lawyer" in questioning the economic rationality of the claimed conspiracy. 170 F.3d at 56. The Second Circuit reversed Judge Lynch for engaging in the same type of analysis, essentially determining that a motion to dismiss is no occasion for substantive thinking.

Likewise, respondents' "ILEC insider" opined that incumbents "don't want to start a cross-border war. . . . Why would they want to start a cross-border battle?" *Id.* at 20. Again, the "insider" does not hint that any agreement would be required to bring home the supposed hazards of "cross-border" competition. More fundamentally, the complaint itself explains in detail how difficult it is for any CLEC to earn a profit competing against the incumbent. *See* Pet. App. 51a-56a. The district court accordingly, and correctly, concluded that the complaint itself affirmatively stated ample independent reason for each defendant, acting on its own, not to devote scarce resources to a risky new business, whose shaky rules for entry had already been thrown out twice by the courts and were soon to be overturned again.[6]

Respondents concede that the conduct alleged in the complaint "led to several antitrust claims" (including a suit by plaintiff Twombly) "alleging *unilateral* monopolistic conduct" rather than "horizontal conspiracy." Opp. at 20 (emphasis added).[7] All this changed, respondents argue, when unnamed "astute observers" read a statement by "a senior executive of Qwest" as "evidence that the ILEC[s'] parallel

---

[6] As noted in the petition, the government testified before Congress that it closely supervised defendants' competitive conduct and was "not aware of evidence of any such agreement." Pet. 25. The government reached that conclusion *after* extraordinarily searching review of the competitive landscape, both in connection with its review of a series of industry mergers (Bell Atlantic/NYNEX, SBC/Pacific Bell, SBC/Ameritech, Bell Atlantic/GTE) and in the course of making recommendations to the FCC regarding defendants' various applications to provide in-region long-distance service under 47 U.S.C. § 271. Other regulators have also considered and rejected allegations of mutual forbearance. *See* Mem. Op. & Order, *Verizon and MCI Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433, ¶¶ 53-54 (2005); Cal. Att'y Gen. Op. at 17, *Joint Application of Verizon and MCI to Transfer Control*, Application No. 05-04-020 (Cal. PUC filed Sept. 16, 2005).

[7] It is only because this Court blocked such suits as unwarranted under Section 2, *see Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), that class-action lawyers (not CLECs, which have businesses to run) have turned to Section 1.

conduct likely [is] *not* the product of unilateral decisions by each ILEC." *Id.* at 21. But, as the district court correctly explained, the Notebaert quote does not strengthen respondents' case. It does not provide any *direct* evidence of agreement – there is no suggestion of agreement with rivals. And, as the district court correctly found, the quote does not imply that Qwest acted contrary to its independent interests by forgoing an investment based on a shaky regulatory regime that was wiped away the following year. *See* Pet. 24 n.6.

It does not take a PhD in economics to understand these points, nor do they depend on knowledge of facts outside the four corners of the complaint and materials – like FCC orders and court decisions – of which judicial notice may be taken. A district judge, applying ordinary legal analysis, evaluated the complaint as a whole and determined, correctly, that its allegations of fact, together with all permissible inferences reasonably drawn from them, failed to state a claim. Under such circumstances, Rule 12 mandates dismissal.

D. The Case Is Important

Respondents do not waste effort arguing that the question presented by this case is unimportant. As diverse amici attest, "[t]he Second Circuit's error presents an issue of tremendous practical importance." Brief of Chamber of Commerce, *et al.*, at 6; *see* Brief of PhRMA at 11-13, 15-17. Plaintiffs are already flocking to the Second Circuit to exploit the lax pleading standard adopted below. *See* Pet. 29. Because parallel but unilateral responses to common market conditions are typically pro-competitive, the deterrence of such conduct by the Second Circuit's pleading standard will be affirmatively harmful until corrected.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL K. KELLOGG
Counsel of Record
MARK C. HANSEN
SEAN A. LEV
AARON M. PANNER
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

JAVIER AGUILAR
WILLIAM M. SCHUR
AT&T SERVICES, INC.
175 E. Houston Street, 4th Floor
San Antonio, Texas 78205
(210) 351-3409
Counsel for AT&T Inc. (formerly SBC Communications Inc.)

SETH P. WAXMAN
WILLIAM J. KOLASKY
WILMER CUTLER PICKERING
HALE AND DORR LLP
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6357

TIMOTHY BEYER
BROWNSTEIN HYATT
& FARBER, P.C.
410 17th Street, 22nd Floor
Denver, Colorado 80202
(303) 223-1116

CYNTHIA P. DELANEY
QWEST COMMUNICATIONS
INTERNATIONAL INC.
1801 California Street
Denver, Colorado 80202
(303) 383-6790
Counsel for Qwest Communications International Inc.

STEPHEN M. SHAPIRO
KENNETH S. GELLER
RICHARD J. FAVRETTO
MAYER, BROWN, ROWE
& MAW LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

LAURA J. COLEMAN
J. HENRY WALKER
MARC W.F. GALONSKY
ASHLEY WATSON
BELLSOUTH CORPORATION
1155 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 249-2720
Counsel for BellSouth Corporation

JOHN THORNE
PAUL J. LARKIN, JR.
DAVID E. WHEELER
ROBERT J. ZASTROW
VERIZON COMMUNICATIONS INC.
1515 North Courthouse Road
Arlington, Virginia 22201
(703) 351-3900

DAN K. WEBB
CHARLES B. MOLSTER III
WINSTON & STRAWN LLP
35 W. Wacker Drive
Chicago, Illinois 60601
(312) 558-5856

RICHARD G. TARANTO
FARR & TARANTO
1220 19th Street, N.W., Suite 800
Washington, D.C. 20036
(202) 775-0184
Counsel for Verizon Communications Inc. (successor-in-interest to Bell Atlantic Corporation)

May 30, 2006

(7)

Supreme Court, U.S.
FILED
APR 6 - 2006
OFFICE OF THE CLERK

No. 05-1126

IN THE

Supreme Court of the United States

BELL ATLANTIC CORPORATION, *ET AL.*,

Petitioners,

v.

WILLIAM TWOMBLY, *ET AL.*, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE AMERICAN PETROLEUM INSTITUTE AS AMICUS CURIAE SUPPORTING PETITIONERS

Harry M. Ng
Doug W. Morris
American Petroleum Institute
1220 L Street, N.W.
Washington, D.C. 20005
(202) 682-8000

Robert A. Long
Counsel of Record
Theodore P. Metzler
COVINGTON & BURLING
1201 Pennsylvania Ave., NW
Washington, DC 20004-2401
(202) 662-6000

April 6, 2006

Counsel for Amicus Curiae

QUESTION PRESENTED

Whether an antitrust complaint alleging only parallel conduct by defendants along with a conclusory allegation of conspiracy is sufficient to state a claim for treble damages under Section 1 of the Sherman Act, 15 U.S.C. § 1.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT 2

ARGUMENT 6

I. The Court of Appeals Has Decided An Important Question In A Way That Conflicts With Decisions Of Other Courts Of Appeals And This Court 7

II. The Practical Effect Of The Court Of Appeals' Decision Is To Prevent The Dismissal Of Meritless Antitrust Claims Prior To Discovery 12

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

Page(s)

Abbott Labs. v. *Brennan*,
952 F.2d 1346 (Fed. Cir. 1991) 12
Asahi Glass Co., Ltd. v. *Pentech Pharms., Inc.*,
289 F. Supp. 2d 986 (N.D. Ill. 2003) 12
Baxley-DeLamar Monuments, Inc. v. *American Cemetery Ass'n*, 843 F.2d 1154 (8th Cir. 1988) 11
Blomkest Fertilizer, Inc. v. *Potash Corp. of Sask., Inc.*, 203 F.3d 1028 (8th Cir. 2000) 9
Brooke Group Ltd. v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) 8
Broyles v. *Wilson*, 812 F. Supp. 651 (M.D. La. 1993) 11
Car Carriers v. *Ford Motor Co.*,
745 F.2d 1101 (7th Cir. 1984) 14
Cayman Exploration Corp. v. *United Gas Pipe Line Co.*, 873 F.2d 1357 (10th Cir. 1989) 10
City of Tuscaloosa v. *Harcros Chems., Inc.*,
158 F.3d 548 11th Cir. 1998) 9
Dillard v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*,
961 F.2d 1148 (5th Cir. 1992) 11
DM Research, Inc. v. *College of Amer. Pathologists*,
170 F.3d 53 (1st Cir. 1999) 10, 12
In re Baby Food Antitrust Litig.,
166 F.3d 112 (3d Cir. 1999) 8
In re Flat Glass Antitrust Litig.,
385 F.3d 350 (3d Cir. 2004) 9
In re Milk Prods. Antitrust Litig.,
84 F. Supp. 2d 1016 (D. Minn. 1997) 11
Lazy Oil Co. v. *Witco Corp.*,
166 F.3d 581 (3d Cir. 1999) 9
Lum v. *Bank of America*, 361 F.3d 217 (3d Cir. 2004) 11
Lupia v. *Stella D'Oro Biscuit Co.*,
586 F.2d 1163 (7th Cir. 1978) 13
Maio v. *Aetna, Inc.*, 221 F.3d 472 (3d Cir. 2000) 12

Market Force, Inc. v. *Wauwatosa Realty Co.*,
906 F.2d 1167 (7th Cir. 1990) 9
Matsushita Elec. Indus. Co. v. *Zenith Radio Corp.*,
475 U.S. 574 (1986) 8
McCleneghan v. *Union Stock Yards Co.*,
298 F.2d 659 (8th Cir, 1962) 12
Monsanto Co. v. *Spray-Rite Serv. Corp.*,
465 U.S. 752 (1984) 7
Pan-Islamic Trade Corp. v. *Exxon Corp.*,
632 F.2d 539 (5th Cir. 1980) 10
Papasan v. *Allain*, 478 U.S. 265 (1986) 12
Pevely Dairy Co. v. *United States*,
178 F.2d 363 (8th Cir. 1949) 8
Rutman Wine Co. v. *E. & J. Gallo Winery*,
829 F.2d 729 (9th Cir. 1987) 13
Standard Oil Co. v. *United States*, 221 U.S. 1 (1911) 7
State Oil Co. v. *Khan*, 522 U.S. 3 (1997) 2
Texaco, Inc. v. *Dagher*, 126 S. Ct. 1276 (2006) 2
Texaco, Inc. v. *Hasbrouck*, 496 U.S. 543 (1990) 2
Theatre Enterprises, Inc. v. *Paramount Film
Distributing Corp.*, 346 U.S. 537, 541 (1954) 8
Volvo Trucks North America, Inc. v. *Reeder-Simco
GMC, Inc.*, 126 S. Ct. 860 (2006) 2
York v. *Ass'n of the Bar*, 286 F.3d 122 (2d Cir. 2002) 12

STATUTES

15 U.S.C. § 1 ..... 1, 2, 7
104 Pub L. 104, 110 Stat. 56 (1996) 2

OTHER

Philip E. Areeda & Herbert Hovenkamp, Antitrust
Law (2d Ed. 2003) 9

INTEREST OF AMICUS CURIAE[1]

The American Petroleum Institute ("API"), a non-profit District of Columbia corporation, is a national trade association for the U.S. oil and natural gas industry. API's more than 400 members cover all facets of the industry, including exploration, production, transportation, refining, and marketing.

This case presents an important question of antitrust law: Whether the mere allegation that competitors have engaged in parallel conduct is sufficient to defeat a motion to dismiss an antitrust claim under Section 1 of the Sherman Act, 15 U.S.C. § 1. Parallel conduct frequently results from independent decisionmaking by competitors pursuing their own economic motivation. Accordingly, parallel conduct does not itself violate the antitrust laws, and evidence of parallel conduct is not by itself sufficient to show an agreement in violation of Section 1 of the Sherman Act. Under the court of appeals' decision in this case, however, antitrust plaintiffs can defeat a motion to dismiss a claim under Section 1 of the Sherman Act, and thus subject the defendants to costly, burdensome, and protracted discovery, by combining allegations of parallel conduct with a conclusory allegation of a conspiracy in restraint of trade. Because API's members may be subjected to such suits, they have a strong interest in the standard that applies in cases alleging that parallel business conduct states an antitrust claim.

---

[1] Letters from Petitioner and Respondent indicating consent to file this brief are on file with the Clerk. Pursuant to this Court's Rule 37.6, API states that no counsel for any petitioner or respondent authored this brief in whole or in part. Nor did any person or entity, other than API, make a monetary contribution to the preparation or submission of this brief.

API frequently participates in legislative, administrative, and judicial proceedings that present issues of national concern, including issues involving interpretation of the antitrust laws. API has participated as *amicus curiae* in other antitrust cases in this Court, including *Texaco, Inc.* v. *Dagher*, 126 S. Ct. 1276 (2006); *Volvo Trucks North America, Inc.* v. *Reeder-Simco GMC, Inc.*, 126 S. Ct. 860 (2006), *State Oil Co.* v. *Khan*, 522 U.S. 3 (1997), and *Texaco, Inc.* v. *Hasbrouck*, 496 U.S. 543 (1990). API believes that its participation as *amicus curiae* in this case will offer the Court an industry-wide perspective on the question presented and its significance.

STATEMENT

This case presents an important and recurring question on which the federal courts of appeals are divided: Whether an antitrust plaintiff states a claim under Section 1 of the Sherman Act, 15 U.S.C. § 1, by alleging that defendants engaged in parallel conduct and that the conduct was the result of a conspiracy.

Respondents are consumers who filed a putative class action alleging that the Petitioner telecommunication companies violated Section 1 of the Sherman Act by conspiring not to compete against one another in their respective geographic markets for local telephone and high-speed Internet services, and to prevent other competitors from entering those markets. Pet. App. 4a-5a.

1. **Respondents' Complaint.** The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, required Petitioners, the former regional Bell operating companies or their successors (known as "incumbent local exchange carriers" or "ILECs"), to open their government-sanctioned and regulated regional monopolies over local telephone service to competition from "competitive local exchange carriers" ("CLECs"). Pet. App. 4a. Respondents allege that Petitioners

conspired to keep CLECs from competing successfully in their respective markets. *Id.* In addition, Respondents allege that Petitioners agreed not to compete in each other's territories. *Id.*

Respondents claim that the conspiracy not to compete is shown by "parallel conduct," in that none of the Petitioners has attempted to enter another's market. According to Respondents, this failure would be "anomalous" absent an agreement not to compete. *Id.* at 5a. Some areas served by one ILEC are surrounded mostly or entirely by territory served by another. *Id.* Respondents contend that the surrounding ILEC would have a natural competitive advantage in the surrounded territory. *Id.* Respondents did not allege any facts about the purported noncompetition agreement, other than that Petitioners had the opportunity to conspire and the ability to keep the conspiracy secret. *See Id.*[2]

Respondents also contend that Petitioners agreed to prevent CLECs from competing successfully in their respective territories by employing various tactics designed to thwart the competition contemplated by the Telecommunications Act. *Id.* at 7a. Though each ILEC is naturally motivated to protect its own territory, Respondents contend that Petitioners "share a common motivation" to keep CLECs from competing in *any*

---

[2] Respondents alleged that two Congressmen wrote to the Department of Justice to complain about Petitioners' "very apparent non-competition policy," and that one executive stated in an interview that an ILEC might "turn a quick dollar" by competing in another's territory but "that doesn't make it right." Pet. App. 6a. Neither of these allegations supports an inference that there was an agreement among the Petitioners. The former is an observation of the same parallel conduct alleged by Respondents, while the latter supports an inference of self-interested conduct at least as strongly as an inference of conspiracy.

territory. According to Respondents, if one ILEC allowed a CLEC to compete, it would demonstrate that such competition can be successful, and the successful CLEC might then pose a threat in other ILECs' territories. *Id.* at 7a-8a. As with the purported agreement not to compete, Respondents did not allege any factual premise for their allegation of a conspiracy to exclude CLECs.

2. The District Court's Decision. The district court dismissed the complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted. Pet. App. 36a. The district court held that allegations of "conscious parallelism," or parallel behavior by competitors, are not sufficient to prove an agreement in violation of Section 1, and therefore not sufficient to survive a motion to dismiss.

The district court held that "parallel action is a common and often legitimate phenomenon, because similar market actors with similar information and economic interests will often reach the same business decisions." *Id.* at 41a. "[A]llowing simple allegations of parallel conduct to entitle plaintiffs to discovery circumvents both § 1's requirement of a conspiracy and Rule 8's requirement that complaints state claims on which relief can be granted." *Id.* at 44a.

The court examined the allegations of the complaint and concluded that they were not sufficient to support an inference that Petitioners were acting pursuant to a mutual agreement rather than their own self-interest. With regard to the alleged agreement not to compete, the court noted that expansion into another ILEC's territory would require Petitioners to enter an entirely new business as a CLEC, and that the market power in an ILEC's home territory would not transfer to an adjacent territory where another company controls the infrastructure. *Id.* at 53a-54a. With regard to Respondent's claim that Petitioners conspired to exclude CLECs, the court reasoned that each ILEC was motivated

to protect its own territory, and would expect the others to be similarly motivated, so there was no basis to infer the conduct "was the result of anything but their individual economic interests." *Id.* at 50a. Because Respondents' allegations did not support an inference that Petitioners' parallel conduct indicated that they had entered into any agreement, the district court found that the complaint did not adequately allege that Petitioners violated Section 1 of the Sherman Act. *Id.* at 58a.

3. The Second Circuit's Opinion. The court of appeals reversed. The court did not take issue with the district court's conclusion that the allegations of the complaint are not sufficient to support a finding that Petitioners entered into an agreement in violation of the Sherman Act, even if all factual allegations are accepted as true and all permissible inferences are drawn in favor of Respondents. Instead, the court of appeals held that the district court "applied an incorrect standard for evaluating the defendants' motion to dismiss." Pet. App. 10a-11a. The court of appeals held that a complaint should survive a motion to dismiss if conspiracy is "among the realm of plausible possibilities," and that allegations of parallel conduct satisfy this "modest" standard. *Id.* at 19a, 22a.

The court of appeals acknowledged that district courts have reached contrary results based on "a well-founded concern that to do otherwise would be to condemn defendants to potentially limitless 'fishing expeditions'—discovery pursued just 'in case anything turns up'—in hopes, perhaps, of a favorable settlement in any event." *Id.* at 27a (notes omitted). The court of appeals stated that it was "not unsympathetic to these concerns," and observed "that a balance is being struck here, that on one side of the balance is the sometimes colossal expense of undergoing discovery, that such costs themselves likely lead defendants to pay plaintiffs to settle what would ultimately be shown to be meritless

claims, that the success of such meritless claims encourages others to be brought, and that the overall result may well be a burden on the courts and a deleterious effect on the manner in which and efficiency with which business is conducted." *Id.* at 28a, 30a. The court of appeals stated that, "[i]f that balance is to be recalibrated, however, it is Congress or the Supreme Court that must do so." *Id.* at 30a.

SUMMARY OF ARGUMENT

To prevail on a claim under Section 1 of the Sherman Antitrust Act, a plaintiff must prove the existence of a conspiracy. The conspiracy can be proved by direct or circumstantial evidence, but the range of inferences available from circumstantial evidence is limited. Conduct that is as consistent with innocent activity as with conspiracy does not support an inference of conspiracy.

Circumstantial evidence that companies have engaged in parallel behavior is at least as consistent with independent decisionmaking as it is with illegal collusion. Competitors in the same market facing the same competitive pressures often rationally and independently come to the same conclusions as to the most advantageous course of action. This Court and the courts of appeals thus agree that standing alone, proof of parallel behavior is not sufficient to prevail on a Sherman Act Section 1 claim. Instead, the courts require that plaintiffs show the existence of some "plus factors" beyond mere parallel conduct that tend to exclude the possibility of independent behavior. Moreover, conclusory allegations of "conspiracy" are insufficient, standing alone, to constitute a cause of action under the antitrust laws.

The district court correctly dismissed the claim in this case, holding that allegations of parallel conduct combined with a conclusory allegation that defendants conspired do not state a claim upon which relief may be

granted. The Second Circuit, however, reversed the district court, holding that so long as conspiracy was among the realm of plausible possibilities, Respondents' allegations of parallel conduct were sufficient to survive a motion to dismiss. This holding directly conflicts with that of the Tenth Circuit, and diverges from opinions of three other courts of appeals, which have held that bare allegations of antitrust conspiracy are insufficient to survive a motion to dismiss. Two additional circuits, meanwhile, have held in accord with the Second, further evincing the split in this case.

The Second Circuit's contrary decision allows meritless antitrust claims to proceed to costly and protracted discovery. As the court itself recognized, this standard will allow unscrupulous plaintiffs to engage in limitless fishing expeditions, and encourages defendants to settle unmeritorious claims to avoid colossal discovery expenses. Rule 12(b)(6) was intended to avoid exactly this situation.

ARGUMENT

I. The Court of Appeals Has Decided An Important Question In A Way That Conflicts With Decisions Of Other Courts Of Appeals And This Court.

A plaintiff alleging a violation of Section 1 of the Sherman Act must prove the existence of a "contract, combination . . . or conspiracy in restraint of trade." 15 U.S.C. § 1; *Standard Oil Co.* v. *United States*, 221 U.S. 1, 59 (1911). Proof of an agreement in restraint of trade requires "evidence that tends to exclude the possibility of independent action by the [defendants]. That is, there must be direct or circumstantial evidence that reasonably tends to prove that [the defendants] had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984).

When an antitrust plaintiff relies on circumstantial evidence to show the existence of an agreement, "antitrust law limits the range of permissible inferences" that may be drawn from such evidence. *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). "[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* The plaintiff "must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Id.* (internal citation omitted).

One type of circumstantial evidence often proffered by antitrust plaintiffs is evidence of a pattern of uniform business conduct by competitors, or "conscious parallelism." Such parallel conduct, however, quite often results from independent decisionmaking by competitors rather than agreement among competitors. *See, e.g., In re Baby Food Antitrust Litig.*, 166 F.3d 112, 135 (3d Cir. 1999) ("[I]f a firm's motivation is merely to meet rival prices, it would constitute only interdependence. Accordingly, to prove conspiracy, evidence of action that is against self-interest or motivated by profit must go beyond mere interdependence."); *Pevely Dairy Co.* v. *United States*, 178 F.2d 363, 368 (8th Cir. 1949) ("Each is forced by the situation itself to take into account the policy of his rival in determining his own [price], and this can not be construed as a 'tacit agreement' between the two."). Consequently, this Court has recognized that "conscious parallelism," by itself, is not sufficient to show an antitrust conspiracy. *Theatre Enters., Inc.* v. *Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954); *see also Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993) ("[C]onscious parallelism" is "not in itself unlawful.").

The courts of appeals have followed this Court in holding that "the Sherman Act does not proscribe"

conscious parallelism. *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 359-360 (3d Cir. 2004); *see also, e.g.*, *City of Tuscaloosa* v. *Harcros Chems., Inc.*, 158 F.3d 548, 570 (11th Cir. 1998) ("It is well settled in this circuit that evidence of conscious parallelism alone does not permit an inference of conspiracy unless the plaintiff either establishes that, assuming there is no conspiracy, each defendant engaging in the parallel action acted contrary to its economic self-interest." (brackets and marks omitted)); *Market Force Inc.* v. *Wauwatosa Realty Co.*, 906 F.2d 1167, 1172 (7th Cir. 1990) ("[C]onscious parallelism by itself is not enough to support an antitrust conspiracy case."); VI Areeda, Antitrust Law ¶ 1434, at 241 (2d Ed. 2003) ("With rare exceptions, the courts have been very clear that mere parallelism, including interdependent conscious parallelism, cannot support a conspiracy finding unless there are additional or 'plus' factors.").

Because "conscious parallelism" often results from independent decisions by competitors, proof of an agreement in restraint of trade requires evidence of other facts and circumstances – often called "plus factors" – that tend to exclude the possibility that the alleged conspirators acted independently. *E.g.*, *Blomkest Fertilizer, Inc.* v. *Potash Corp. of Sask., Inc.*, 203 F.3d 1028, 1033 (8th Cir. 2000) (en banc) ("An agreement is properly inferred from conscious parallelism only when certain 'plus factors' exist."); *Lazy Oil Co.* v. *Witco Corp.*, 166 F.3d 581, 588 n.11 (3d Cir. 1999) (Where "there is no direct evidence of a price-fixing conspiracy, . . . [plaintiffs] must present evidence both of conscious parallelism and of 'plus factors' to make out a price-fixing case.")

While the courts of appeals uniformly require an antitrust plaintiff alleging parallel conduct as the basis for a conspiracy to show the existence of "plus factors" in order to survive a motion for summary judgment, the courts have split over whether such a plaintiff must make more than a conclusory allegation of conspiracy at the

pleadings stage. In this case, the Second Circuit held that an allegation of parallel conduct is sufficient. Pet. App. 25a. Other circuits have come to contrary conclusions.

The Tenth Circuit held, in *Cayman Exploration Corp.* v. *United Gas Pipe Line Co.*, that a plaintiff alleging conscious parallel behavior, without more, does not state a claim under the antitrust laws. 873 F.2d 1357, 1361 (10th Cir. 1989). In *Cayman*, the plaintiff had alleged a horizontal price fixing conspiracy in a market for natural gas transmission. *Id.* As in this case, the plaintiff in *Cayman* "failed to allege *any* facts which would support an inference that the alleged actions by [defendants] would be contrary to their economic interests absent an agreement." *Id.* (emphasis in original). The Tenth Circuit therefore held that the antitrust claim was properly dismissed for failure to state a claim upon which relief may be granted. *Id.* Quoting the Fifth Circuit's opinion in *Pan-Islamic Trade Corp.* v. *Exxon Corp.*, 632 F.2d 539, 559 (5th Cir. 1980), the court held, "The antitrust plaintiff who relies on a theory of 'conscious parallelism' must establish that 'defendants engaged in consciously parallel action . . . which was contrary to their economic self-interest so as not to amount to good faith business judgment.'" 873 F.2d at 1362.

The Second Circuit's opinion also diverges from decisions of two additional circuits. The First Circuit has held that an antitrust complaint may be dismissed where it fails to give a sufficient factual predicate to support the allegation of conspiracy. *DM Research, Inc.* v. *College of Am. Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999). In that case, the court held that "the price of entry, even to discovery, is for the plaintiff to allege a factual predicate concrete enough to warrant further proceedings, which may be costly and burdensome. Conclusory allegations in a complaint, if they stand alone, are a danger sign that the plaintiff is engaged in a fishing expedition." *Id.* Similarly, the Eighth Circuit has held that a Section 1

claim survives a motion to dismiss only if it alleges, at least minimally, "facts constituting the conspiracy, its object and accomplishment." *Baxley-DeLamar Monuments, Inc.* v. *American Cemetery Ass'n*, 843 F.2d 1154, 1156 (8th Cir. 1988).[3]

The circuit split presented in this case is even more pronounced because two circuits have held, in line with the Second Circuit here, that an allegation of parallel conduct without further allegations of "plus factors" is sufficient to withstand a motion to dismiss. *Lum* v. *Bank of America*, 361 F.3d 217, 230 (3d Cir. 2004) ("[P]laintiff need not allege the existence of these plus factors in order to plead an antitrust cause of action."); *Dillard* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1159 (5th Cir. 1992) (holding conscious parallelism sufficient to withstand a motion to dismiss where plaintiff alleged opportunity to conspire). The Second Circuit's opinion thus conflicts or is in sharp tension with three other courts of appeals, and agrees with two.

* * *

The complaint in this case alleged that Petitioners engaged in parallel behavior by resisting the entry of CLECs into their own geographic markets and by failing to enter one another's geographic markets. As the district court explained, the parallel behavior alleged is at least

---

[3] District courts also regularly dismiss claims of antitrust conspiracy for failing to allege facts constituting the conspiracy. *E.g.*, *In re Milk Prods. Antitrust Litig.*, 84 F. Supp. 2d 1016, 1020 (D. Minn. 1997) ("[G]eneral allegations of a conspiracy will not suffice; the claim must include a statement of the facts constituting the conspiracy, its object and accomplishment."); *Broyles* v. *Wilson*, 812 F. Supp. 651, 655 (M.D. La. 1993) ("[N]o facts are alleged which, if proved, would establish that [defendants] are part of any conspiracy.").

as consistent with independent action as with collusion. Although the complaint also included a conclusory allegation that the defendants agreed to restrain trade in violation of Section 1, it did not make any factual allegations that, if accepted as true, would support a finding of liability under Section 1.

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), will be granted if the allegations of the complaint, and all reasonable inferences therefrom, will not support a finding of liability. *E.g.*, *Papasan* v. *Allain*, 478 U.S. 265, 283 (1986); *York* v. *Ass'n of the Bar*, 286 F.3d 122, 125 (2d Cir. 2002); *Maio* v. *Aetna, Inc.*, 221 F.3d 472, 481-82 (3d Cir. 2000). "[A] general allegation of conspiracy, without a statement of the facts constituting that conspiracy, is only an allegation of a legal conclusion and is insufficient to constitute a cause of action." *McCleneghan* v. *Union Stock Yards Co.*, 298 F.2d 659, 663 (8th Cir, 1962) (Blackmun, J.); *see also Abbott Labs.* v. *Brennan*, 952 F.2d 1346, 1355 (Fed. Cir. 1991) ("Allegations of legal conclusions are insufficient to withstand a motion to dismiss."). Under that basic rule, the district court correctly dismissed the complaint in this case, and the Second Circuit was incorrect to hold that a conclusory allegation of conspiracy transforms a claim of parallel conduct into a claim upon which treble damages may be granted under the Sherman Act.

II. The Practical Effect Of The Court Of Appeals' Decision Is To Prevent The Dismissal Of Meritless Antitrust Claims Prior To Discovery.

Discovery in civil antitrust cases is often extremely burdensome and expensive, frequently running into millions of dollars and consuming many months or even years. *See DM Research*, 170 F.3d at 55 (describing antitrust discovery as "costly and burdensome"); *Asahi Glass Co., Ltd.* v. *Pentech Pharms., Inc.*, 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003) (Posner, J., sitting by

designation) (antitrust discovery is "inevitably costly and protracted"). Discovery may extend to scores or even hundreds of individuals and millions of documents.

Because a prevailing defendant generally cannot recover its litigating costs from the plaintiff, defendants may settle even meritless antitrust cases for significant sums in order to avoid costly and burdensome discovery. As the Second Circuit recognized, an undemanding pleading standard may encourage plaintiffs to bring meritless claims and then use the threat of expensive discovery as leverage to obtain a settlement. "[T]he statutory private antitrust remedy of treble damages affords a special temptation for the institution of vexatious litigation." *Lupia* v. *Stella D'Oro Biscuit Co.*, 586 F.2d 1163, 1167 (7th Cir. 1978).

Under the Second Circuit's standard, would-be plaintiffs need only observe parallel behavior among competitors in any market in order to bring suit, an observation that will exist in almost any market at some point. If such a plaintiff recites the parallel conduct and adds a bare assertion that it is due to "conspiracy," he will escape dismissal of the complaint and subject defendants to the choice of expensive discovery or settlement.

Rule 12(b)(6) is designed, in part, to prevent precisely this situation. *Rutman Wine Co.* v. *E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) ("The purpose of F.R. Civ. P. 12(b)(6) is to enable defendants to challenge the legal sufficiency of complaints without subjecting themselves to discovery.") There is no reason why it should not play this function in antitrust cases. "When the requisite elements are lacking, the costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint. A contrary view would be tantamount to providing antitrust litigation

with an exemption from Rule 12(b)(6)." *Car Carriers* v. *Ford Motor Co.*, 745 F.2d 1101, 1106-1107 (7th Cir. 1984).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Harry M. Ng
Doug W. Morris
American Petroleum Institute
1220 L Street, N.W.
Washington, D.C. 20005
(202) 682-8000

Robert A. Long
Counsel of Record
Theodore P. Metzler
COVINGTON & BURLING
1201 Pennsylvania Ave., NW
Washington, DC 20004-2401
(202) 662-6000

Counsel for Petitioners

April 6, 2006

(B)

No. 05-1126

Supreme Court U.S.
FILED
APR 6 - 2006

In the Supreme Court of the United States

BELL ATLANTIC CORPORATION, ET AL.,

Petitioners,

v.

WILLIAM TWOMBLY, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, CTIA – THE WIRELESS ASSOCIATION, THE ALLIANCE OF AUTOMOBILE MANUFACTURERS, NORTHWEST AIRLINES, INC., AND UNITED AIR LINES, INC., AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

ROBIN S. CONRAD
AMAR D. SARWAL
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20036
(202) 463-5337

MICHAEL FIELD ALTSCHUL
CTIA – The Wireless Association
1400 16th Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 785-0081

JOHN T. WHATLEY
Alliance of Automobile Manufacturers
1401 H Street, N.W., Suite 900
Washington, D.C. 20005
(202) 326-5500

ROY T. ENGLERT, JR.*
DONALD J. RUSSELL
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

PETER B. KENNEY, JR.
Northwest Airlines, Inc.
Department A1180
2700 Lone Oak Parkway
Eagan, MN 55121-1534
(612) 726-3663

RICKS P. FRAZIER
United Air Lines, Inc.
1200 E. Algonquin Rd.
Elk Grove Township, IL 60007
(847) 700-4446

* *Counsel of Record*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* 1

STATEMENT 3

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. This Court's Motion-to-Dismiss Precedents Leave Ample Room to Weed out Vexatious Litigation by Applying the Sound Substantive Principle that Antitrust Law Limits the Range of Permissible Inferences from Ambiguous Evidence in a Case Under Section 1 of the Sherman Act 7

II. Allowing Plaintiffs to Proceed Past the Pleading Stage, Without any Indication that They Have Evidence or a Theory on Which They Could Actually Prevail, Will Coerce Blackmail Settlements of Meritless Cases 14

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

Cases

Associated General Contractors v. *California State Council of Carpenters*, 459 U.S. 519 (1983) 12, 13

Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975) 6, 8, 12

Conley v. *Gibson*, 355 U.S. 41 (1957) 5, 7, 8, 9, 12, 13

Coopers & Lybrand v. *Livesay*, 437 U.S. 463 (1978) 18

DM Research, Inc. v. *College of American Pathologists*, 170 F.3d 53 (1st Cir. 1999) 10-11

Discon, Inc. v. *NYNEX Corp.*, 93 F.3d 1055 (2d Cir. 1996), rev'd, 525 U.S. 128 (1998) 16

Dura Pharmaceuticals, Inc. v. *Broudo*, 125 S. Ct. 1627 (2005) 6, 12, 13

Heart Disease Research Foundation v. *General Motors Corp.*, 463 F.2d 98 (2d Cir. 1972) 10

In re Network Associates, Inc., Securities Litigation, 76 F. Supp. 2d 1017 (N.D. Cal. 1999) 14

In re Polymedica Corp. Securities Litigation, 432 F.3d 1 (1st Cir. 2005) 17

In re Rhône-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995) 18

TABLE OF AUTHORITIES—Continued

Page(s)

In re Visa Check/MasterMoney Antitrust Litigation, 280 F.2d 124, 135 (2d. Cir. 2001), cert. denied, 536 U.S. 917 (2002) 17

Law Offices of Curtis V. Trinko, L.L.P. v. *Bell Atlantic Corp.*, 305 F.3d 89 (2d Cir. 2002), rev'd, 540 U.S. 398 (2004) 16-17

Matsushita Electric Industrial Co. v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) 11, 18

Sutton v. *United Air Lines, Inc.*, 527 U.S. 483 (1999) 8

Swierkiewicz v. *Sorema N.A.*, 534 U.S. 506 (2002) ... 12, 13

Szabo v. *Bridgeport Machines, Inc.*, 249 F.3d 672 (7th Cir. 2001) 17

Theatre Enterprises, Inc. v. *Paramount Film Distribution Corp.*, 346 U.S. 537 (1954) 10, 18

Verizon Communications Inc. v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) 9

TABLE OF AUTHORITIES—Continued

Page(s)

Statutes and Rules

Federal Rule of Civil Procedure 8 ..... 6, 13

Federal Rule of Civil Procedure 8(f) 5, 7, 12

Federal Rule of Civil Procedure 12(b)(6) 4, 6, 12, 13

Federal Rule of Civil Procedure 56 4

Miscellaneous

6 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW (2d ed. 2003) 9, 10, 11

HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW (1973) 14

Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits – The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1 (1971) 14

Mass Torts and Class-Action Lawsuits: Oversight Hearings Regarding Mass Torts and Class Action Lawsuits Before the House Committee on the Judiciary, Subcommittee on Courts and Intellectual Property, 105th Cong. 29-30 (Mar. 5, 1998), available at http://commdocs.house.gov/committees/judiciary/hju59921.000/hju59921_0.HTM 16

S. Rep. No. 109-14 (2005), *reprinted in* 2005 USCCAN 3 15

TABLE OF AUTHORITIES—Continued

Page(s)

Linda Silberman, *The Vicissitudes of the American Class Action – With a Comparative Eye*, 7 TUL. J. INT'L & COMP. L. 201 (1999) 14

Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962) 10

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia and is the world's largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community. The Chamber is well situated to brief the Court on the importance of the issues presented in the petition to companies collectively responsible for a substantial portion of total U.S. economic activity. The Chamber is concerned not only that the decision below sets a pleading standard for antitrust litigation that is inconsistent with both substantive antitrust law and general pleading law, but also that it does so in a context – a massive consumer class action complaint – that unleashes the most abusive kind of litigation, often brought to coerce settlement of weak cases rather than with any real prospect of success on the merits. By diverting resources away from productive economic uses, meritless antitrust actions threaten to slow the spread of new investments, reduce the efficiency of capital markets, and limit the competitiveness of the American economy. The membership of the Chamber thus has a strong interest in ensuring that the requirements of the federal antitrust

---

[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk. Pursuant to Rule 37.6 of the Rules of this Court, *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity other than the *amici curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief.

laws and the Federal Rules of Civil Procedure are applied in a correct and uniform manner, weeding out meritless suits as quickly and regularly as practicable, to avoid undue harm to the Nation's commerce and industry.

CTIA – The Wireless Association represents all segments of the wireless communications industry. Members of CTIA include service providers, manufacturers, wireless data and Internet companies, and other industry participants. CTIA has filed *amicus* briefs in this Court and other federal courts on a variety of issues of interest to the wireless industry in such disparate cases as *Bartnicki* v. *Vopper*, 532 U.S. 514 (2001), and *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113 (2005). Many of CTIA's members provide service directly to consumers, and CTIA is concerned that the decision below might allow massive consumer class actions to proceed without any real factual basis.

The Alliance of Automobile Manufacturers is a trade association composed of nine car and light truck manufacturers. The Alliance is the leading advocacy group for the automobile industry on a range of public policy issues. The Alliance has long been concerned about abusive antitrust litigation, including vexatious class actions.

Northwest Airlines and United Air Lines are two of the world's five largest airlines. Each has been providing passenger service continuously since the 1920s. Northwest and United operate in an industry in which sustained profitability has been extremely elusive. Yet the forces of competition often leave particular routes served only by one or two carriers, and rational business decisionmaking in this industry necessarily depends on assessments of – but not agreement on – other carriers' likely responses. The resulting high "market shares" and appearances of interdependent carrier behavior may make airlines attractive targets for spurious antitrust litigation. If the pleading threshold is as low as the Second Circuit has indicated in the decision below, Northwest and United are concerned that they may be subjected to meritless antitrust litigation, including class actions,

brought by counsel in possession of observations of lawful "parallel" conduct by airlines but no facts at all to suggest an actual antitrust violation.

STATEMENT

The very first sentence of the district court's opinion gives a hint of just how remarkable the present litigation is: "Plaintiffs William Twombly and Lawrence Marcus bring this putative class action on behalf of themselves and *all other individuals who purchased local telephone or high speed internet services in the continental United States between February 8, 1996, and the present*." Pet. App. 35a (emphasis added). In fact, the case is even more gargantuan: "This lawsuit is brought as a class action on behalf of all individuals *and entities* who purchased local telephone and/or high speed internet services * * *." Am. Compl. ¶ 1 (emphasis added). Essentially, this is a lawsuit on behalf of virtually every business in the continental United States and every human being who has set foot in the continental United States over a multi-year period. Even more remarkably, this case is one in which the defendants are facilities-based local telephone service providers that serve the overwhelming majority of all consumers in the continental United States, and in which the allegation is that, but for a vaguely pleaded "conspiracy," the entire industry structure would have been different, with each defendant entering markets it has chosen not to enter. More remarkably still, this case involves what is essentially smoking-gun evidence that plaintiffs' counsel are engaged in opportunistic behavior in the hope of extorting a settlement, as they have filed and abandoned a complaint in one jurisdiction and then repackaged the same allegations – with the addition of a conclusory allegation of "conspiracy," alleged "upon information and belief" – in another jurisdiction. See Pet. 4-5; Am. Compl. ¶ 51.

Two courts below examined the complaint. The district court acknowledged that "[a]ll reasonable inferences are to be

drawn in the plaintiffs' favor." Pet. App. 40a.[2] The district court believed itself at liberty to examine the complaint through the lens of substantive antitrust doctrine and to dismiss the complaint because it alleged only lawful parallel conduct, with a conclusory "conspiracy" allegation tacked on. The court of appeals, by contrast – setting up the issue with unusual precision for this Court's review – reversed "[b]ecause we disagree with the standard that the district court applied in reviewing the sufficiency of the plaintiffs' allegations." Pet. App. 3a. Although parallel conduct is lawful, and "plus factors" is the shorthand phrase courts have come up with to describe the factors that can permit an inference that otherwise-lawful parallel conduct was the product of an unlawful conspiracy, the court regarded "plus factors" as irrelevant at the pleading stage. Pet. App. 25a ("plus factors are not *required* to be pleaded to permit an antitrust claim based on parallel conduct to survive dismissal"). The court was prepared to let the antitrust complaint in this case go forward on the theory that "a pleading of facts indicating parallel conduct by the defendants" – *i.e.*, pleading *only* lawful behavior – "can suffice to state a plausible claim of conspiracy." *Ibid.*

The court of appeals criticized district court decisions (including the one it was reversing) that have looked to "plus factors" at the pleading stage as "elid[ing] the distinction between the standard applicable to Rule 12(b)(6) and Rule 56 motions on the basis of a well-founded concern that to do so otherwise would be to condemn defendants to potentially limitless 'fishing expeditions' – discovery pursued just 'in case anything turn[s] up' – in hopes, perhaps, of a favorable settlement in any event." Pet. App. 27a (footnotes omitted). Although the point of those decisions is simply that a complaint alleging only *lawful* con-

---

[2] The court of appeals, surprisingly, went further and wrote that it would "accept[] as true all facts alleged in the complaint and draw[] all inferences" – not just reasonable ones – in favor of the plaintiff." Pet. App. 11a. Whether or not the court meant to state a different standard, it accepted inferences antitrust law forbids, as discussed below.

duct should be dismissed, the court of appeals viewed them as imposing an impermissible "heightened pleading requirement." *Id.* at 28a. The court was "not unsympathetic" to concerns about vexatious litigation (*ibid.*; see also *id.* at 30a) but thought such concerns irrelevant under this Court's precedents.

SUMMARY OF ARGUMENT

Federal Rule of Civil Procedure 8(f) commands that "all pleadings shall be so construed as to do substantial justice." *Conley* v. *Gibson*, 355 U.S. 41, 48 (1957), relied on that instruction and added that pleading should not be treated as a "game of skill" but that instead "[t]he purpose of pleading is to facilitate a proper decision on the merits." Those fundamental principles supported the position of the plaintiffs in *Conley* but support the position of the defendants in this case. Here plaintiffs – not defendants – are treating pleading as a game of skill, in which they can impose great cost on defendants through artful pleading, with no real facts to support their antitrust claims, in an effort to coerce settlement. This is neither "substantial justice" nor consistent with numerous decisions of this Court that approve the grant of motions to dismiss in analogous circumstances.

The antitrust claim in this case depends on the existence of a conspiracy, not mere parallel conduct. Substantive antitrust law – not a doctrine of civil procedure applicable only at the summary judgment stage – makes it critical that a plaintiff wishing to pursue conspiracy allegations have something more to point to than parallel conduct. The something more cannot be a barebones allegation of conspiracy. Instead, the plaintiff must allege some *facts* tending to show that the parallel conduct was not as innocent as it appears on its face – facts that can take many forms, but that courts have labeled collectively as "plus factors." The absence of any such allegations in the complaint supports dismissal under this Court's precedents.

Furthermore, the Federal Rules of Civil Procedure and this Court's cases do not constrain courts to close their eyes to the

practical consequences of allowing a dubious complaint to go forward. This Court's recent opinion in *Dura Pharmaceuticals, Inc.* v. *Broudo*, 125 S. Ct. 1627 (2005), observed – as a factor supporting a Rule 12(b)(6) dismissal – that "allowing a plaintiff to forgo giving any indication of the economic loss and proximate cause that the plaintiff has in mind would * * * permit a plaintiff 'with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the [discovery] process will reveal relevant evidence.'" 125 S. Ct. at 1634 (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 741 (1975)). In applying the ordinary standards of Rule 8 and Rule 12(b)(6), the Court found it appropriate to consider the practical consequences of allowing the litigation to go forward. It is therefore simply not true – as the Second Circuit believed – that only a "heightened pleading requirement" will allow courts to examine antitrust complaints searchingly enough to avoid clogging the courts for years and rewarding plaintiffs' attorneys for bringing meritless claims. Pet. App. 28a.

The Second Circuit's error presents an issue of tremendous practical importance and merits review by this Court. Lawyer-driven class actions like this case systematically lead to what Judge Friendly, borrowing terminology from antitrust scholar Milton Handler, called "blackmail settlements." Just last year, the Senate Judiciary Committee expressed similar concerns, which have been voiced by many others through the years. The Second Circuit's new, low threshold for pleading antitrust conspiracy claims is particularly alarming because the same court – covering the commercial center of the United States – has previously announced a particularly low threshold for class certification. The two main ways that defendants can avoid paying blackmail settlements before summary judgment (achieving dismissal under Rule 12(b)(6) or defeating class certification) are thus both unduly difficult in the Second Circuit.

This case at this stage presents no class certification question, but it does provide this Court with a golden opportunity to correct a situation that – by the Second Circuit's own admission – leads to "a burden on the courts and a deleterious effect on the manner in which and efficiency with which business is conducted." Pet. App. 30a. A proper application of both substantive principles of antitrust law and the Federal Rules of Civil Procedure supports the district court's well-reasoned opinion dismissing the complaint. This Court should grant certiorari and reverse.

ARGUMENT

I. This Court's Motion-to-Dismiss Precedents Leave Ample Room to Weed out Vexatious Litigation by Applying the Sound Substantive Principle that Antitrust Law Limits the Range of Permissible Inferences from Ambiguous Evidence in a Case Under Section 1 of the Sherman Act

Conley v. *Gibson*, 355 U.S. 41 (1957), is often quoted for the plaintiff-friendly pleading standard it stated. *E.g.*, Pet. App 11a. But the case – in which a labor union stood idly by while a railroad employer purported to abolish 45 jobs held by African-Americans but then refilled the positions with white employees or with the same African-American employees with loss of seniority – is not one in which the Court evaluated the plaintiffs' complaint in a vacuum. Rather, the Court "[f]ollow[ed] the simple guide of [Federal] Rule [of Civil Procedure] 8 (f) that 'all pleadings shall be so construed as to do substantial justice.'" 355 U.S. at 48. The Court further decried the notion that "pleading is a game of skill." *Ibid.* "The purpose of pleading is to facilitate a proper decision on the merits." *Ibid.*

Those three principles – doing substantial justice, avoiding turning litigation into a game, and facilitating proper decisions on the merits – are principles that, in *Conley*, favored the plaintiffs over the efforts of the defendants to interpose technical objections to the plaintiffs' pleadings of blatant dis-

crimination. But they are *not* principles that *invariably* favor plaintiffs – at the motion-to-dismiss stage or at any other stage of litigation.

When a complaint reveals fatal flaws in the plaintiffs' theory of the case, doing substantial justice requires dismissing the complaint, not trying to imagine some hypothetical way for the fatal flaws to be overcome. *E.g.*, *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 483, 491 (1999) (affirming grant of motion to dismiss: "Considering the allegations of the amended complaint in tandem, petitioners have not stated a claim that respondent regards their impairment as *substantially limiting* their ability to work.").

The principle that game-playing litigation behavior should not be rewarded leaves room for courts to separate vexatious from meritorious litigation when evaluating a complaint. *E.g.*, *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 742-743 (1975) (reversing decision that had reversed grant of motion to dismiss: "in this type of litigation, where the mere existence of an unresolved lawsuit has settlement value to the plaintiff not only because of the possibility that he may prevail on the merits, an entirely legitimate component of settlement value, but because of the threat of extensive discovery and disruption of normal business activities which may accompany a lawsuit which is groundless in any event, but cannot be proved so before trial, such a factor is not to be totally dismissed"). *Conley* warned against making "one misstep by [plaintiffs'] counsel * * * decisive to the outcome," 355 U.S. at 48, but it is no less true that one clever step by plaintiffs' counsel (such as adding a conclusory "conspiracy" allegation "upon information and belief" to an otherwise facially groundless complaint) should not be enough to force an entire industry to endure massive litigation with no real foundation. But cf. Pet. App. 30a (suggesting that it would take a "re-calibration" of existing law to give courts any power to do anything about "the sometimes colossal expense of undergoing discovery," pressures to settle meritless claims whose success encourages others to be brought, and "the

overall result * * * [of] a burden on the courts and a deleterious effect on the manner in which and efficiency with which business is conducted").

And the third governing principle this Court identified in *Conley*, facilitating a proper decision on the merits, requires careful attention by courts to the substantive body of law a complaint seeks to invoke, and the lines that body of law draws between legal and illegal conduct. *E.g.*, *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (reversing Second Circuit decision that had reversed grant of motion to dismiss antitrust case: "The question before us today is whether the allegations of respondent's complaint fit within existing exceptions [to the general principle that a firm need not help its rivals] or provide a basis, under traditional antitrust principles, for recognizing a new one."); *id.* at 414 ("Against the slight benefits of antitrust intervention here, we must weigh a realistic assessment of its costs."). Even at the motion-to-dismiss stage, this Court has never shied away from a searching application of substantive antitrust principles to the plaintiffs' theory of the case. Such an application is not, as the court of appeals mistakenly believed, applying a "heightened pleading standard." Rather, it is recognizing that the distinctions made important by substantive antitrust law should be observed at *every* stage of the litigation, so as to facilitate a proper decision on the merits.

The antitrust claim in this case depends on the existence of a conspiracy, not mere parallel conduct. The district court observed – correctly, and without contradiction by the court of appeals – that "parallel action is a common and often legitimate phenomenon, because similar market actors with similar information and economic interests will often reach the same business decisions." Pet. App. 41a; see also 6 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1405a, at 21 (2d ed. 2003) ("Problematically, parallel conduct is often forced by circumstance: under such circumstances a 'rational' profit-

maximizing firm will always act in a way that is similar to its rivals.").

Courts have long openly grappled with the problems stemming from the prevalence of "parallel" business behavior, creating an opening for antitrust plaintiffs to try to claim that the firms acting in parallel *must* have agreed with each other to do so. More than 50 years ago, this Court addressed the issue in an opinion by Justice Tom C. Clark, who had previously been the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice. In *Theatre Enterprises, Inc.* v. *Paramount Film Distribution Corp.*, 346 U.S. 537 (1954), the Court declared emphatically that agreement may *not* be inferred from the parallel behavior alone. "Seemingly with some exasperation, the *Theatre Enterprises* opinion declared that 'circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but "conscious parallelism" has not yet read conspiracy out of the Sherman Act entirely.'" 6 AREEDA & HOVENKAMP, *supra*, ¶ 1412b, at 70 (quoting *Theatre Enterprises*, 346 U.S. at 541).

Just a few years after this Court decided *Theatre Enterprises*, a leading antitrust commentator wrote: "The point is that conscious parallelism is never meaningful by itself, but always assumes whatever significance it might have from additional facts." Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 658 (1962). Substantive antitrust law – not a doctrine of civil procedure applicable only at the summary judgment stage – makes it critical that a plaintiff wishing to pursue conspiracy allegations have something more to point to than parallel conduct. The something more cannot be a bare-bones allegation of conspiracy. Even in the Second Circuit, "a bare bones statement of conspiracy * * * without any supporting facts permits dismissal of a complaint." *Heart Disease Research Foundation* v. *General Motors Corp.*, 463 F.2d 98, 100 (2d Cir. 1972); accord, *e.g.*, *DM Research, Inc.* v. *College of*

American Pathologists, 170 F.3d 53, 56 & n.1 (1st Cir. 1999) (Boudin, J.). Instead, what must be alleged beyond parallel conduct is some *facts* tending to show that the parallel conduct was not as innocent as it appears on its face – facts that can take many forms, but that courts have labeled collectively as "plus factors." *E.g.*, Pet. App. 42a.[3]

Given that the purpose of examining plus factors is to separate lawful from unlawful conduct, it is mystifying why the court of appeals thought plus factors relevant at the summary-judgment stage but irrelevant at the motion-to-dismiss stage. It is not some peculiar feature of the summary-judgment standard, but rather "[a]ntitrust law," that "limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). "[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Ibid.*

Even if courts were powerless – as the Second Circuit thought it was – to consider at the motion-to-dismiss stage the practical consequences of unleashing massive litigation that would place enormous pressure on the defendants to settle a meritless lawsuit, there would be no reason to sustain a com-

---

[3] Of course, a plaintiff claiming, in more than a conclusory allegation, to have direct evidence of conspiracy would be entitled to survive a motion to dismiss. But the closest thing in this complaint to direct evidence – a single quotation from a Qwest executive that entering another local telephone market "might be a good way to turn a quick dollar but that doesn't make it right," see Pet. 24 n.6 (quoting Am. Compl. ¶ 42) – is pathetically inadequate. As Judge Lynch correctly observed, "[c]onsidered in context, [the quoted] statements suggest only that [the executive] did not consider becoming a CLEC to be a sound long-term business plan." Pet. App. 56a. "One must not characterize a firm's sacrifice of short-run interest in favor of long-run interest as contrary to its self-interest. Such a sacrifice by itself tells us nothing about possible conspiracy * * *." 6 AREEDA & HOVENKAMP, *supra*, ¶ 1415e, at 99-100.

plaint that alleged lawful parallel conduct but none of the plus factors that might make it unlawful. See *Dura Pharmaceuticals, Inc.* v. *Broudo*, 125 S. Ct. 1627, 1634 (2005) (the holding that plaintiffs must *prove* particular facts to prevail leads also to conclusion they must *allege* those facts to survive a motion to dismiss); *Associated General Contractors* v. *California State Council of Carpenters*, 459 U.S. 519, 526 (1983) ("It is not * * * proper to assume the [plaintiff] can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged."). But the Federal Rules of Civil Procedure and this Court's cases do not, in fact, constrain courts to close their eyes to the practical consequences of allowing a dubious complaint to go forward. As already noted, Federal Rule of Civil Procedure 8(f) commands that "[a]ll pleadings * * * be so construed as to do substantial justice," a command hardly compatible with knowingly allowing "potentially limitless 'fishing expeditions'" (Pet. App. 27a) and "a deleterious effect on the manner in which and efficiency with which business is conducted" (*id.* at 30a). And this Court's recent *Dura* opinion found it appropriate to observe – as a factor supporting a Rule 12(b)(6) dismissal – that "allowing a plaintiff to forgo giving any indication of the economic loss and proximate cause that the plaintiff has in mind would * * * permit a plaintiff 'with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the [discovery] process will reveal relevant evidence.'" 125 S. Ct. at 1634 (quoting *Blue Chip Stamps*, 421 U.S. at 741).

Notably, before making those observations, the Court stated that it "assume[d], at least for argument's sake, that neither the Rules nor the securities statutes impose any special further requirement in respect to the pleading of proximate causation or economic loss." 125 S. Ct. at 1634. The Court acknowledged the "simple test" of *Conley* v. *Gibson*, *supra*, and the "not * * * great burden" of *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506, 513-515 (2002). Still, in applying the ordinary standards of

Rule 8 and Rule 12(b)(6), the Court found it appropriate to consider the practical consequences of allowing the litigation to go forward. It is therefore simply not true – as the Second Circuit believed – that only a "heightened pleading requirement" will allow courts to examine antitrust complaints searchingly enough to avoid clogging the courts for years and rewarding plaintiffs' attorneys for bringing meritless claims. Pet. App. 28a.

The present case is based on a theory that an entire industry would have been structured differently but for antitrust violations. It should give a court pause that such a far-reaching lawsuit might be allowed based on such a toothless review of the complaint's allegations as that undertaken below. The massive scope of plaintiffs' complaint is *not* irrelevant to the degree of scrutiny it should have received in the courts below. This is not a complaint about 45 railroad jobs, as in *Conley* v. *Gibson*, or a complaint about one person's allegedly discriminatory demotion and constructive discharge, as in *Swierkiewicz*. It is not even a complaint about declines in the price of one stock, as in *Dura* – in which this Court nevertheless found the *in terrorem* effect of litigation highly relevant to the 12(b)(6) inquiry. It is a mega-lawsuit in which the purported plaintiff class is hundreds of millions of persons and businesses, and the defendants are an entire industry. A rule of civil procedure meant to promote "substantial justice" does not require a pretense that such a lawsuit is the same as a relatively small case, when the consequence is to empower the organized class-action bar to bring meritless lawsuits for the sole purpose of coercing settlements. "Certainly in a case of this magnitude, a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Associated General Contractors*, 459 U.S. at 528 n.17.

II. Allowing Plaintiffs to Proceed Past the Pleading Stage, Without any Indication that They Have Evidence or a Theory on Which They Could Actually Prevail, Will Coerce Blackmail Settlements of Meritless Cases

The question presented by this case is of tremendous practical importance and merits resolution by this Court. Indeed, the Second Circuit itself was forthright in acknowledging the nature of the beast its decision was unleashing. See Pet. App. 27a-28a, 30a. The court even went so far as to admit that "the success of such meritless claims [in coercing settlements] encourages others to be brought." *Id.* at 30a.

It is no accident that the pleading question presented by this case arises in the context of a putative class action brought by a law firm that is part of the organized plaintiffs' class-action bar. Lawyers, not clients, drive cases of this sort. See *In re Network Associates, Inc., Securities Litigation*, 76 F. Supp. 2d 1017, 1032 (N.D. Cal. 1999) (quoting attorney William S. Lerach: "I have the greatest practice in the world because I have no clients. I bring the case. I hire the plaintiff. I do not have some client telling me what to do. I decide what to do.").

The impetus for cases like this one is not actual suspicion of wrongdoing, and certainly not the expectation that an actual trial on the merits will yield success, but the hope that the thinnest of allegations, with the greatest of legal consequences, will survive motions to dismiss and begin to put pressure on defendants to settle complex litigation. See Linda Silberman, *The Vicissitudes of the American Class Action – With a Comparative Eye*, 7 TUL. J. INT'L & COMP. L. 201, 205 (1999). Judge Friendly – borrowing a term used earlier by antitrust scholar Milton Handler – termed this the "blackmail settlement." HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973) (citing Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits – The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971)).

The Senate Judiciary Committee observed last year:

> Because class actions are such a powerful tool, they can give a class attorney unbounded leverage, particularly in jurisdictions that are considered plaintiff-friendly. Such leverage can essentially force corporate defendants to pay ransom to class attorneys by settling – rather than litigating – frivolous lawsuits. This is a particularly alarming abuse because the class action device is intended to be a procedural tool and not a mechanism that affects the substantive outcome of a lawsuit. * * * [W]hen plaintiffs seek hundreds of millions of dollars in damages, basic economics can force a corporation to settle the suit, even if it is meritless and has only a five percent chance of success.
>
> Not surprisingly, the ability to exercise unbounded leverage over a defendant corporation and the lure of huge attorneys' fees have led to the filing of many frivolous class actions.

S. Rep. No. 109-14, at 20-21 (2005), *reprinted in* 2005 USCCAN 3, 21.

Former Attorney General Dick Thornburgh put the matter even more bluntly seven years earlier in testimony before the House Judiciary Committee:

> There is nothing inherently wrong with the general concept of the class action lawsuit or the theory of aggregation of claims. These suits have held an honored place in American law and in British common law for centuries. Adjudication for a class has always been feasible whenever class members have a common legal interest that could not practically be resolved one at a time.
>
> * * * * *
>
> Relatively recently, however, plaintiffs' lawyers, often styling themselves consumer attorneys, have been allowed to wield class actions as judicial weapons of mass destruction.

> These suits promise such devastating consequences that even the most innocent of defendants must settle or risk near total annihilation.
>
> To add insult to these injuries, these plaintiffs' lawyers purport to hold the moral high ground. They act as if they were not mere attorneys, but private sector attorneys general. Yet, they are not bound or constrained in any way by Democratic processes.
>
> * * * * *
>
> Far more corrupting to the law, these class actions are often initiated, not by the class members themselves, but by a group of class action lawyers who divide up shares of litigation as if lawsuits were investment properties.

Mass Torts and Class-Action Lawsuits: Oversight Hearings Regarding Mass Torts and Class Action Lawsuits Before the House Committee on the Judiciary, Subcommittee on Courts and Intellectual Property, 105th Cong. 29-30 (Mar. 5, 1998) (testimony of former Attorney General Dick Thornburgh), available at http://commdocs.house.gov/committees/judiciary/hju59921.000/hju59921_0.HTM.

The pressure to settle does not begin only as a case approaches trial, but as discovery expenses mount up, before the defendants can ever move for summary judgment. In most cases, there are only two opportunities for the defendants to ease the settlement pressure before the summary-judgment stage: the filing of a motion to dismiss, and opposition to a motion for class certification. In the decision below, the Second Circuit has made the first opportunity practically unavailable even in the most obviously meritless of antitrust cases, in which a warmed-over complaint adds a conclusory allegation of "conspiracy" to allegations of lawful parallel conduct. See also *Discon, Inc.* v. *NYNEX Corp.*, 93 F.3d 1055 (2d Cir. 1996) (reversing dismissal of antitrust complaint), rev'd, 525 U.S. 128 (1998) (unanimous decision); *Law Offices of Curtis V. Trinko, L.L.P.* v. *Bell Atlantic Corp.*, 305 F.3d 89 (2d Cir. 2002) (reversing dismissal

of antitrust complaint), rev'd, 540 U.S. 398 (2004) (unanimous decision).

In an earlier – and widely criticized – decision, the Second Circuit made the second opportunity practically unavailable in a case of any complexity as well. In another massive antitrust case, the Second Circuit declared that a district court may certify a class as long as a plaintiff can come up with admissible expert testimony to support class certification. A district court must only "ensure that the basis of the expert opinion is not so flawed that it would be inadmissible as a matter of law." *In re Visa Check/MasterMoney Antitrust Litigation*, 280 F.2d 124, 135 (2d. Cir. 2001), cert. denied, 536 U.S. 917 (2002). "[A] district court may not weigh conflicting expert evidence or engage in 'statistical dueling' of experts. The question for the district court at the class certification stage is whether plaintiffs' expert evidence is sufficient to demonstrate common questions of fact warranting certification of the proposed classes, not whether the evidence will ultimately be persuasive." *Ibid.* (citations omitted). Other circuits have rejected that approach. The most recent example is *In re Polymedica Corp. Securities Litigation*, 432 F.3d 1, 5-6 (1st Cir. 2005), in which the First Circuit expressly rejected the *Visa Check/MasterMoney* precedent, and instead opted to follow "the majority of courts of appeals that have addressed this issue, [holding that] a district court * * * instead should make whatever legal and factual inquiries are necessary to an informed determination of the certification issues." An earlier and pithier criticism was that an approach to class certification like the Second Circuit's "cannot be found in Rule 23 and has nothing to recommend it." *Szabo* v. *Bridgeport Machines, Inc.*, 249 F.3d 672, 676 (7th Cir. 2001).[4]

---

[4] *Amici* the Chamber, the Alliance of Automobile Manufacturers, and Northwest Airlines have each unsuccessfully urged this Court to resolve the circuit split pertaining to class certification standards between, on the one hand, courts that follow the Second Circuit's approach and, on the other hand, the approach of at least the First, Third, Fourth, Fifth, and

Combining an inappropriately low threshold for pleading antitrust claims with an inappropriately low threshold for achieving class certification makes the Second Circuit – which includes the commercial center of the United States – a nightmare jurisdiction in which to defend a putative class action under the antitrust laws. This Court has recognized that "[c]ertification of a large class may so increase the defendant's potential economic damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978). Class certification presents such pressures because defendants cannot "stake their companies on the outcome of a single jury trial." *In re Rhône-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995). Yet defeating certification has long been unduly difficult in the Second Circuit, and now defeating meritless antitrust claims at the motion-to-dismiss stage will be unduly difficult as well. The result is an intolerable burden on the business community.

This case presents the Court with an excellent opportunity to apply to massive antitrust class actions both the substantive principles of *Matsushita* and *Theatre Enterprises* and the principle expressly stated in the governing Federal Rule of Civil Procedure that pleadings shall be so construed as to do substantial justice. The well-reasoned opinion of the district court dismissing the complaint complies with those principles, and the opinion of the court of appeals semi-apologetically reversing, while recognizing all the deleterious features of its own decision, does not. Parallel conduct is not a violation of the antitrust

---

Seventh Circuits. See Petition for a Writ of Certiorari, *Northwest Airlines Corp.* v. *Chase*, No. 02-1447 (filed March 31, 2003, denied June 2, 2003); Brief for the Chamber of Commerce of the United States as *Amicus Curiae* in Support of Petitioner, *UnitedHealth Group, Inc.* v. *Klay*, No. 04-522 (brief filed Dec. 3, 2004, cert. denied Jan. 10, 2005); Brief of the Alliance of Automobile Manufacturers et al. as *Amici Curiae* in Support of Petitioners, *Visa U.S.A. Inc.* v. *WalMart Stores, Inc.*, No. 01-1464 (filed May 6, 2002, cert. denied June 10, 2002).

laws, and a complaint that adds nothing of real substance to lengthy allegations of parallel conduct should not be allowed to launch huge, costly litigation purportedly on behalf of hundreds of millions of plaintiffs. This Court can and should grant certiorari and reverse.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBIN S. CONRAD
AMAR D. SARWAL
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20036
(202) 463-5337

MICHAEL FIELD ALTSCHUL
CTIA – The Wireless Association
1400 16th Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 785-0081

JOHN T. WHATLEY
Alliance of Automobile Manufacturers
1401 H Street, N.W.
Suite 900
Washington, D.C. 20005
(202) 326-5500

ROY T. ENGLERT, JR.*
DONALD J. RUSSELL
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

PETER B. KENNEY, JR.
Northwest Airlines, Inc.
Department A1180
2700 Lone Oak Parkway
Eagan, MN 55121-1534
(612) 726-3663

RICKS P. FRAZIER
United Air Lines, Inc.
1200 E. Algonquin Rd.
Elk Grove Township, IL 60007
(847) 700-4446

* *Counsel of Record*

APRIL 2006

(3)

SUPREME COURT, U.S.
FILED
APR 6 - 2006
OFFICE OF THE CLERK

No. 05-1126

IN THE

Supreme Court of the United States

BELL ATLANTIC CORPORATION, *ET AL.*,
Petitioners,

v.

WILLIAM TWOMBLY, *ET AL.*, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF *AMICI CURIAE* ECONOMISTS IN SUPPORT OF PETITIONER

R. HEWITT PATE
Counsel of Record
PAUL S. HAYES
HUNTON & WILLIAMS LLP
1900 K Street, N.W.
Washington D.C. 20006
(202) 955-1500

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether a complaint states a claim under Section 1 of the Sherman Act, 15 U.S.C. § 1, if it alleges that the defendants engaged in parallel conduct and adds an unadorned assertion that defendants were participants in a "conspiracy," without alleging any facts that, if later proved true, would establish the existence of a conspiracy under the applicable legal standards.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF THE *AMICI CURIAE*	1
PRELIMINARY STATEMENT	2
INTRODUCTION AND SUMMARY	3
ARGUMENT	7
I. PARALLEL BEHAVIOR AMONG NON-CONSPIRING FIRMS IN THE SAME INDUSTRY IS NORMAL AND COMMON	7
II. THE "PARALLEL BEHAVIOR IS ENOUGH" STANDARD WOULD PERMIT CLAIMS OF CONSPIRACY TO RESTRAIN TRADE AGAINST ALMOST ALL FIRMS	9
III. THE "PARALLEL BEHAVIOR IS ENOUGH" STANDARD POSES A SIGNIFICANT ISSUE OF JUDICIAL AND PUBLIC POLICY	11
IV. THE "PARALLEL BEHAVIOR IS ENOUGH" STANDARD WOULD RESULT IN GREATER EXPENDITURE OF JUDICIAL AND BUSINESS RESOURCES	13
V. THE "PARALLEL BEHAVIOR IS ENOUGH" STANDARD WOULD RESULT IN REDUCED ECONOMIC EFFICIENCY AS FIRMS LIMIT EFFICIENT PARALLEL BEHAVIOR	14

TABLE OF CONTENTS—Continued

Page

VI. THE "PLUS FACTOR" STANDARD STRIKES A REASONABLE BALANCE BETWEEN DETECTING AND DETERRING CONSPIRACIES AND LIMITING THE INCENTIVES OF FIRMS TO ENGAGE IN NORMAL PRO-COMPETITIVE BEHAVIOR 18

CONCLUSION 20

APPENDIX 1a

TABLE OF AUTHORITIES

CASES — Page

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993) 9, 16

Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996) 12

In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995) 12

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 9, 16, 19

Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984) 9, 16

Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537 (1954) 9, 16

Twombly v. Bell Atlantic Corp., 313 F. Supp. 2d 174 (S.D.N.Y. 2003), *rev'd* 425 F.3d 99 (2d Cir. 2005) 3, 4

Twombly v. Bell Atlantic Corp., 425 F.3d 99 (2d Cir. 2005) 4, 5, 7, 12

STATUTES

Sherman Act, 15 U.S.C. § 1 ..... *passim*

OTHER MATERIALS

S. Bikhchandani, D. Hirshleifer and I. Welch, *Learning from the Behavior of Others: Conformity, Fads, and Informational Cascades*, 12 J. Econ. Persp. 3 (1998) 8

Dennis W. Carlton and Jeffrey M. Perloff, *Modern Industrial Organization* (4th ed. 2005) 7, 15

Boyan Jovanovic and Glenn Macdonald, *Competitive Diffusion*, 102 J. Pol. Econ. 1 (1994) 8

T. Kauper and E. Snyder, *An Inquiry into the Efficiency of Private Antitrust Enforcement*, 74 GEO. L. REV. 1163 (1986) 11

TABLE OF AUTHORITIES—Continued

Page

Marvin Lieberman and Shigeru Asaba,, *Why do Firms Imitate Each Other*, 31 Academy Mgmt Rev. 2 (2006) 8

N. Gregory Mankiw, *Principles of Micro-economics* (3d ed. 2004) 7

R. Nelson and S. G. Winter, *An Evolutionary Theory of Economic Change* (1982) 9

Pet. for a Writ of Certiorari, *Bell Atlantic Corp. v. Twombly* (No. 05-1126) 3, 12

Jan Rivkin, *Imitation of Complex Strategies*, 46 Mgmt Sci. 6 (2000) 8

Paul A. Samuelson and William D. Nordhaus, *Economics* (18th ed. 2005) 5, 7, 15

D. Scharfstein and J.C. Stein, *Herd Behavior and Investment*, 80 Amer. Econ. Rev. 3 (1990) 8

Paul Segerstrom, *Innovation, Imitation and Economic Growth*, 99 J. Pol. Econ. 4 (1991) 8

Adam Smith, *The Wealth of Nations* (Modern Library 1994) 11

E. Snyder and T. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 Mich. L. Rev. 551 (1991) 11

W. Kip Viscusi, Joseph E. Harrington, Jr. and John M. Vernon, *Economics of Regulation & Antitrust* (4th ed. 2005) 11

IN THE

Supreme Court of the United States

No. 05-1126

BELL ATLANTIC CORPORATION, *ET AL.*,
Petitioners,

v.

WILLIAM TWOMBLY, *ET AL.*, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* ECONOMISTS IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE* [1]

Amici are professors and scholars who teach and write on economics and, in particular, on the economics of industrial organization and antitrust policy. They include William Baumol, Michael Boskin, Robert Crandall, Kenneth Elzinga, David S. Evans, Gerald Faulhaber, Franklin Fisher, Luke Froeb, Richard Gilbert, Paul Joskow, Michael Katz, Paul

[1] The parties have consented to the submission of this brief and their letters of consent have been filed with the Clerk of this Court. This brief was not written in whole or in part by counsel for a party. No person or entity other than *amici* made any monetary contribution to the preparation or submission of this brief. *Amici* and their counsel were not compensated in any way.

Milgrom, Thomas Moore, Robert Pindyck, Robert Porter, Frederic Scherer, Richard Schmalensee, Marius Schwartz, Vernon Smith, Edward Snyder, Michael Spence, Pablo Spiller, Alan Sykes, David Teece, and Michael Whinston. A summary with titles and affiliations appears in the Appendix at the end of this brief. *Amici* file solely as individuals and not on behalf of any institutions with which they are affiliated. *Amici* have not been retained by any party in this action.

PRELIMINARY STATEMENT

Two or more firms, selling in the same market, price their product "in similar ways" over time (or otherwise act similarly). Is that fact, together with a claim that the sellers conspired to fix prices (or agreed on some other dimension of competition), enough for a plaintiff to survive a motion to dismiss and set the wheels of litigation in motion under Section 1 of the Sherman Act, at least until summary judgment? As we read the Second Circuit's decision, the answer is "yes, that is enough." This court of appeals decided that rivals acting in parallel in a manner that would be illegal if the result of conspiracy, together with an unsupported assertion of conspiracy, was sufficient to survive a motion to dismiss.

The undersigned economists believe the Second Circuit has taken antitrust enforcement in a misguided direction by adopting its "parallel behavior is enough" standard and in failing to require that a complaint contain facts sufficient to support an inference of conspiracy. (We do not offer a view as to exactly how heavy an additional burden plaintiffs should bear at this stage.)

Based on our own research and experience, the "parallel behavior is enough" standard would impose direct costs on business firms (in the form of diverted management time) and deadweight costs on the economy (through resources used up in rent-seeking litigation). More significantly, in our view, pricing, entry, marketing, and other business decisions would

be colored by a dismissal rule that, in effect, opens U.S. businesses to unsubstantiated allegations of conspiracy to restrain trade.

Parallel behavior is a common feature of the dynamic competitive market processes. The prospect that actions similar to those taken by competitors could support at least the discovery phase of antitrust claims filed by various parties would, at the margin, discourage sellers responding to market signals in ways that might seem to be mimicking the conduct of rivals. Market forces may be moving equilibrium prices up or down in response to demand or supply shifts. In either case, the efficient response is to have firms "price in similar ways," not to deter such conduct.

INTRODUCTION AND SUMMARY

This matter poses two alternative standards for allowing a claim of conspiracy in restraint of trade in violation of Section 1 of the Sherman Act to go forward.

The first is the one adopted by the district court in *Twombly v. Bell Atlantic Corp.*, 313 F. Supp. 2d 174 (S.D.N.Y. 2003), *rev'd* 425 F.3d 99 (2d Cir. 2005), and applied, as we understand it, by the Courts of Appeals for the First, Sixth, and Tenth Circuits: a claim of conspiracy can survive a motion to dismiss only if the allegations in the complaint, if proven to be true, tend to exclude the possibility that the claimed conspirators acted independently. (*See* Pet. for a Writ of Cert., *Bell Atlantic Corp. v. Twombly* (No. 05-1126), at 19-20.) The fact of parallel behavior, standing alone, does not tend to exclude the possibility of independent action: firms that compete with one another often behave like one another in at least some respects. Therefore, under this standard, a claim can proceed only if there is something more than parallel behavior, requiring what is sometimes called "plus factors." Applying this "plus factor" standard the district court dismissed the plaintiffs' case because the court

could not infer a conspiracy from the allegations in the complaint. *See Twombly*, 313 F. Supp. 2d at 189 ("The allegations of plaintiffs' complaint provide no reason to believe that defendants' parallel conduct was reflective of any agreement. The complaint therefore alleges nothing more than parallel conduct that appears to accord with the individual economic interests of the alleged conspirators.").

The second is the one adopted by the Second Circuit (and by no other court of appeals to our knowledge): a claim can proceed based on allegations of parallel behavior and an assertion that this parallel behavior is the result of conspiracy. *See Twombly v. Bell Atlantic Corp.*, 425 F.3d 99, 114 (2d Cir. 2005) ("But plus factors are not required to be pleaded to permit an antitrust claim based on parallel conduct to survive dismissal."). To do otherwise, reasoned the Second Circuit, "a court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence." *Id.* It is hard to imagine a court being able to reach such a conclusion in a real case. And, applying this "parallel behavior is enough" standard, the Second Circuit reversed the dismissal without examining, for all intents and purposes, whether the facts alleged supported to any extent an inference of conspiracy.

The observation that the defendants engage in parallel behavior is not a sound basis on which to infer collective conduct. The district court reasoned correctly that "parallel action is a common and often legitimate phenomenon, because similar market actors with similar information and economic interests will often reach the same business decisions." *Twombly*, 313 F. Supp. 2d at 179. Economic analysis supports this: competing firms often act similarly because they

respond to the same demand and supply forces.[2] The Second Circuit's reasoning, on the other hand, could sustain a conspiracy claim against thousands of farmers who receive the same price for their wheat, since one cannot exclude with absolute certainty that they conspired to charge the same price.

The "parallel behavior is enough" standard would enable plaintiffs to claim that sellers in the same alleged market engaged in a conspiracy in restraint of trade on the basis of the fact that they acted in similar ways, such as increasing or decreasing prices around the same time, entering or not entering certain markets, introducing or not introducing similar competing products, and so forth. The sweeping nature of the standard is seen in the case at hand. According to the Second Circuit, the parallel failure of the defendants to enter each other's territories—their failure to take an action—along with an unsupported assertion that this parallel failure was the result of conspiracy was sufficient for the case to proceed to discovery. *See Twombly*, 425 F.3d at 117-18.

This "parallel behavior is enough" standard would impose significant costs on the economy and, thus, on consumers. Plaintiffs could pursue class action cases against companies based on only garden-variety economic behavior such as raising prices in response to higher demand or reducing capacity in response to shrinking demand. Rather than incurring the cost of discovery and litigation, and facing the risks always attendant in litigation even for innocent defendants, companies will often settle these lawsuits. That will provide further incentives to file frivolous cases. The direct costs to businesses resulting from this cycle of litigation and settlement costs are likely to be substantial in the aggregate.

---

[2] *See* Paul A. Samuelson & William D. Nordhaus, *Economics* 51-53, 152-57 (18th ed. 2005).

However, these visible costs could be just the tip of the iceberg. Expected litigation and settlement costs are one of the factors that businesses consider in making decisions. Businesses will face a so-called "tax" in making the same efficient decisions as their competitors. At the margin, this tax will deter businesses from responding efficiently to changes in costs, demand, or technology. Over time it will reduce economic wealth and economic productivity.

The "plus factor" standard provides wide latitude for plaintiffs to pursue claims that businesses have conspired to restrain trade while limiting the disincentive that businesses would face under the "parallel behavior is enough" standard for taking the same competitive actions as their rivals. Under the former standard, the courts inquire whether the facts pled tend to support an inference of conspiracy. (We take no view on exactly how strong this support should be.) This standard would require plaintiffs to allege behavior that is inconsistent with normal competitive behavior and would therefore limit cases to those in which it is at least plausible that a conspiracy took place. For example, in the current case, courts would examine whether the failure to enter each other's markets was inconsistent with normal competitive behavior. The district court concluded it was not.

The Second Circuit concluded that the district court should not even have addressed this question. However, it recognized that its "parallel behavior is enough" standard could impose "colossal" costs that would induce defendants to settle "meritless claims":

> We are mindful that a balance is being struck here, that on one side of that balance is the sometimes colossal expense of undergoing discovery, that such costs themselves likely lead defendants to pay plaintiffs to settle what would ultimately be shown to be meritless claims, that the success of such meritless claims encourages others to be brought, and that the overall result

> may well be a burden on the courts and a deleterious effect on the manner in which and efficiency with which business is conducted. If that balance is to be re-calibrated, however, it is Congress or the Supreme Court that must do so.

Twombly, 425 F.3d at 117.

We urge the Supreme Court to recalibrate the balance selected by the Second Circuit and avoid the "colossal" costs on the economy recognized by that court.

ARGUMENT

I. PARALLEL BEHAVIOR AMONG NON-CONSPIRING FIRMS IN THE SAME INDUSTRY IS NORMAL AND COMMON

Firms that operate in the same market commonly make similar business decisions for several reasons well known to economists.

To begin with, consider the textbook example of a market for a homogeneous commodity in which many small firms face the same demand and cost conditions.[3] In such a perfectly competitive market, all firms charge the same price at all times, so that all change price in parallel. Price in this idealized situation is determined not by collusion, but by the forces of supply and demand as they affect competitors acting independently. A change in demand (perhaps because of a rise in gross domestic product (GDP)) or a change in supply (perhaps because of a fall in the cost of an input) will change the market price. All firms in the market, therefore, would change their price accordingly. Thus, in perfect competition without collusion, economists expect that all competing firms

---

[3] *See* Samuelson & Nordhaus, *Economics* 147-48 (18th ed. 2005); Dennis W. Carlton & Jeffrey M. Perloff, *Modern Industrial Organization* 56-58 (4th ed. 2005); N. Gregory Mankiw, *Principles of Microeconomics* 290 (3d ed. 2004).

will act in parallel with each other. (These sorts of changes may also lead some firms to enter or exit the business.)

Of course, few, if any, real-world markets are perfectly competitive. However, the process just described applies broadly. Competing firms may end up charging different prices because they differentiate their products or they have some market power over some group of customers. However, because they face similar demand and cost conditions, an industry-wide change in demand or cost that leads one firm to change its prices will ordinarily lead its rivals to change their prices in the same direction for the same reason.

The proposition that firms in the same market commonly act in parallel in the absence of any sort of conspiracy is not restricted to prices. Competing firms make product design, entry, location, marketing, and other business decisions based on similar market conditions and information. Not surprisingly, because they are all seeking to maximize profit subject to similar constraints, they tend to make similar decisions.

Economists have identified several other factors that lead to firms in the same market engaging in parallel behavior.[4] Suppose firm A sees firm B do something that affects its market position (e.g., change the package size it sells). Firm A may follow firm B for three reasons. First, it may believe that firm B has superior information. In fact, much innovation gets diffused through industries precisely because of this imitative behavior.[5] Second, firm B's action may give it a

---

[4] *See* Marvin Lieberman & Shigeru Asaba, *Why do Firms Imitate Each Other*, 31 Academy Mgmt Rev. 2: 366-85 (2006); S. Bikhchandani, D. Hirshleifer & I. Welch, *Learning from the Behavior of Others: Conformity, Fads, and Informational Cascades*, 12 J. Econ. Persp. 3:151-70 (1998); D. Scharfstein & J.C. Stein, *Herd Behavior and Investment*, 80 Amer. Econ. Rev. 3: 465-79 (1990).

[5] Jan Rivkin, *Imitation of Complex Strategies*, 46 Mgmt Sci. 6: 824-44 (2000); Boyan Jovanovic & Glenn MacDonald, *Competitive Diffusion*, 102 J. Pol. Econ. 1: 24-52 (1994); Paul Segerstrom, *Innovation, Imitation*

competitive advantage: firm A can limit that competitive advantage by copying firm B. Third, it is possible that firm A and firm B, without conspiring, have decided to follow each other's changes in this arena. This sort of "conscious parallelism" is not a conspiracy and it is our understanding that it is not illegal. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984); *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954).

Of course, firms may also engage in parallel behavior as a result of a conspiracy. But, because there are other, more common sources of parallel behavior, merely observing parallel behavior does not, as a matter of logic, tend to exclude the possibility of independent action.

II. THE "PARALLEL BEHAVIOR IS ENOUGH" STANDARD WOULD PERMIT CLAIMS OF CONSPIRACY TO RESTRAIN TRADE AGAINST ALMOST ALL FIRMS

The "parallel behavior is enough" standard would allow conspiracy claims against firms that have engaged in routine competition to survive a motion to dismiss. As we understand it, a plaintiff could sue two or more firms for conspiring to restrain trade in violation of Section 1 of the Sherman Act by (a) alleging that these firms made similar competitive business decisions that would be illegal if they were the result of a conspiracy, and (b) asserting, without offering any facts to support it, that this parallel behavior is in fact the result of a conspiracy.

---

and Economic Growth, 99 J. Pol. Econ. 4: 807-27 (1991); R. Nelson & S. G. Winter, *An Evolutionary Theory of Economic Change* 265, 267-68 (Belknap Press, 1982).

Because under this standard plaintiffs need not have any evidence that the behavior was the result of a conspiracy and may simply claim this, the only part of the standard that could limit the universe of potential defendants is whether it is possible to plead facts (that must be taken as true) that support (a) above. Virtually all firms in the economy will be at risk under this standard. Incumbents will have changed price in parallel in response to demand and cost changes. Firms may have all lowered price when significant entry occurred. They will have relied on the same information and analysis of the same business conditions, to enter markets, chose business locations, design products, invest in innovation, and make other decisions that affect market outcomes. Many firms will also have imitated rivals for a variety of reasons.

As we understand the Second Circuit's standard for dismissing a claim of conspiracy in restraint of trade, it would be possible for plaintiffs to assert a claim that would survive dismissal against virtually any set of two or more competing firms in the economy. (We have used the qualification "virtually" only because we cannot logically exclude the possibility of an exception.) Because a showing of market power is not a requirement for a Sherman Act Section 1 claim, the more than 24 million businesses[6] in the United States could, in principle, be subject to claims that could not be dismissed under the "parallel behavior is enough" standard.

---

[6] According to the U.S. Census Bureau the total of U.S. businesses was 24,416,241 in 2003, *available at* http://www.census.gov/csd/susb/susb03.htm.

III. THE "PARALLEL BEHAVIOR IS ENOUGH" STANDARD POSES A SIGNIFICANT ISSUE OF JUDICIAL AND PUBLIC POLICY

Economists have long recognized that conspiracies to restrain trade can cause significant economic losses through higher prices and reduced output.[7] Although agreements among competitors may promote economic efficiency, conspiracies, in which the members have suppressed the existence of an agreement among themselves, seldom, if ever, serve any competitive and efficiency-enhancing purpose. Conspiracies can also impose significant costs on society and are, by design, secret and hard to detect. Hence, there are sound economic reasons to impose substantial penalties to discourage firms from conspiring to restrain trade. The undersigned believe that antitrust law—and the courts—should be tough on cartels.

Economists have also recognized, however, that the legal system can impose significant costs on businesses, reduce economic efficiency, and ultimately harm consumers through higher prices and poorer products.[8] Unfortunately, some lawyers—or the plaintiffs they represent—abuse the legal system by filing cases that ultimately lack merit but impose significant costs and risks on business defendants. Research indicates that private antitrust enforcement efforts already involve many claims that appear to be without merit.[9] This

---

[7] *See* Adam Smith, *The Wealth of Nations* 148 (Modern Library, 1994) ("People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.").

[8] *See* W. Kip Viscusi, Joseph E. Harrington, Jr. & John M. Vernon, *Economics of Regulation & Antitrust* 39-40 (4th ed. 2005).

[9] *See* E. Snyder and T. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 Mich. L. Rev. 551, 551-603 (1991); T. Kauper and E. Snyder, *An Inquiry into the Efficiency of Private Antitrust Enforcement*, 74 Geo. L. Rev. 1163 (1986).

underscores the problem noted by the Second Circuit. *See Twombly*, 425 F.3d at 114-17. Some plaintiffs' lawyers use litigation to extract money from businesses that find it is cheaper and less risky to settle than to litigate.[10] Class certification litigation is sometimes used to extort companies into writing large checks that often inure to the benefit of the lawyers.

In determining the appropriate standard for dismissal of a claim of conspiracy to restrain trade, society faces a tradeoff, as do the courts. On the one hand, making it easier for plaintiffs to pursue claims and obtain discovery will increase the likelihood that plaintiffs will uncover conspiracies in restraint of trade. An easier standard will, more importantly, discourage conspiracies in the first place because they are more likely to be detected and punished. On the other hand, making it easier for plaintiffs to file claims and pursue discovery will encourage plaintiffs to bring cases that lack merit in the hope of a settlement or verdict and, in the process, consume judicial and business resources. Moreover, firms would face a disincentive to engage in parallel behavior with their rivals because that behavior will make it more likely that they will be embroiled in litigation. Therefore, they will engage in less parallel behavior even when this behavior is efficient.

As we understand it, there is disagreement among the circuit courts on how to measure this tradeoff. (*See* Pet. for a Writ of Cert., *Bell Atlantic Corp. v. Twombly* (No. 05-1126), at 19-20.)

---

[10] *See, e.g., Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (noting that "class certification creates an insurmountable pressure on defendants to settle, whereas individual trials would not"); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299-1300 (7th Cir. 1995) (discussing the implications of the plaintiffs' claims lacking legal merit).

IV. THE "PARALLEL BEHAVIOR IS ENOUGH" STANDARD WOULD RESULT IN GREATER EXPENDITURE OF JUDICIAL AND BUSINESS RESOURCES

The "parallel behavior is enough" standard would encourage plaintiffs to file and pursue claims that companies have engaged in restraints of trade in violation of Section 1 of the Sherman Act. This likely would include plaintiffs adding gratuitous conspiracy charges to complaints in unrelated matters (breach of contract cases for example) to increase the costs of the litigation to defendants and put additional pressure on the defendants to settle. The direct cost of this standard and the behavior it would encourage includes costs to the judiciary as well as to businesses.

Additional judicial resources would be spent handling cases with conspiracy claims that meet the "parallel behavior is enough" standard. These include expenditures for personnel and other judicial resources. They also include the opportunity cost of the federal judiciary's time. Assuming the federal courts cannot expand to meet the additional litigation that would result under the "parallel behavior is enough" standard. the federal court dockets would become more congested. Other matters would receive less attention from the courts. The litigants in these other matters. and ultimately society. would suffer from the diversion of judicial resources to unmeritorious conspiracy claims. Businesses would also spend resources defending unfounded conspiracy claims. These costs would include direct litigation expenses such as hiring lawyers and handling document production. More importantly. they would include the opportunity cost of management and staff time spent on litigation rather than on business matters [11]

---

[11] The processing time of complex antitrust requests was 484 days in 2005. *See* U.S. Department of Justice. "Chapter VII. Compliance with

V. THE "PARALLEL BEHAVIOR IS ENOUGH" STANDARD WOULD RESULT IN REDUCED ECONOMIC EFFICIENCY AS FIRMS LIMIT EFFICIENT PARALLEL BEHAVIOR

Under the "parallel behavior is enough" standard, plaintiffs could claim conspiracy in restraint of trade against a firm by pleading facts that the firm acted in a way similar to its rivals and simply alleging that it did so as part of a conspiracy. The inclusiveness of the standard is best seen in the case at hand. Each of the incumbent local exchange carriers (ILECs) was accused of conspiring with the other local exchange carriers not because of any parallel action they took but because of parallel inaction they took. Each was alleged to have failed to avail itself of a provision of the Telecommunications Act of 1996 that could enable it to enter the other ILECs' territories and obtain interconnection privileges. Under the Second Circuit's view at least, the "parallel behavior is enough" standard would include actions in which two or more firms took similar actions or, alternatively, both decided not to take an action. In the case at hand, one can easily imagine the plaintiffs claiming conspiracy in restraint of trade if all of the ILECs had in fact entered each others' territories; then the claim could have been that the ILECs did that to preempt competition from the competing local exchange carriers (CLECs).

Any of the following similar actions by two or more firms could be considered parallel behavior:

- entering a geographic area
- not entering a geographic area
- charging similar prices
- raising prices
- not raising prices

Time Limits/Status of Pending Requests" *in Freedom of Information Act (FOIA) Report for Fiscal Year 2005, available at* http://www.usdoj.gov/oip/annual_report/2005/05foiapg7.htm.

- lowering prices (in response to entry, say)
- introducing a new product line
- not introducing a new product line
- filing for a patent
- not filing for a patent
- adopting a particular new technology
- failing to adopt a particular new technology

The list is limited only by the ingenuity of the plaintiffs and their lawyers.

Economists have long recognized that competition among firms tends to lead to economic efficiency as firms seek advantages over one another.[12] Competing firms try to reduce their costs and seek unmet demand. Each, however, is responding to demand, costs, technological opportunities, information, public policies, and risk in the marketplace. In independently striving to lower costs and expand sales, rivals often mimic each other, just as prominent athletic teams do, as they compete in the marketplace. When one firm takes an action before its competitors do, the competitors typically examine that action to understand whether this leader secured a competitive advantage that they should also seek to share. This leads firms to imitate one another, though innovative firms often secure short-run benefits before their rivals catch on. This dynamic process of competition, which is the source of much of the growth in productivity and product improvement, is built, in great part, on behavior that at least appears parallel.

Economists and the courts are aware that firms also may follow each other in order to reduce rivalry. For example, a firm may choose not to reduce price because it knows its rivals will reciprocate with lower prices as well. The courts

---

[12] *See* Samuelson & Nordhaus, *Economics* 158-59, 216, 283 (18th ed. 2005); Carlton & Perloff, *Modern Industrial Organization* 69-71 (4th ed. 2005).

have recognized, however, that it is difficult to distinguish competitive behavior from conscious parallelism. Therefore, they have decided that the benefits of discouraging conscious parallelism outweigh the costs of discouraging competitive parallel behavior that promotes efficiency. As noted above, it has long been established that conscious parallelism, even if it results in parallel behavior, does not violate Section 1 of the Sherman Act or any other rule of U.S. antitrust law.[13]

A similar tradeoff is at the heart of the policy issue that is posed by the alternative standards for dismissing a claim of conspiracy in restraint of trade. Allowing plaintiffs to pursue claims of conspiracy that meet the "parallel behavior is enough" standard may unearth some conspiracies that would not be detected under the "plus factor" standard (just as any discovery "fishing expedition" may by chance uncover evidence that could lead to a valid claim). The "parallel behavior is enough" standard, however, will impose a tax on the dynamic process of competition that will tend to discourage firms from engaging in efficient behavior. From the standpoint of economics, the policy issue presented by the alternative dismissal standards for a conspiracy in restraint of trade is whether the additional conspiracies uncovered and deterred by the less exacting standard is worth the resulting loss in dynamic competition and efficiency.

The undersigned have not conducted any studies of the loss in social welfare that would result from the "parallel behavior is enough" tax and it may be difficult, if not impossible, to quantify the loss. However, we believe the Court should be cognizant of potential costs resulting from this tax in assessing the tradeoff we have discussed above.

---

[13] *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984); *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954).

Parallel behavior can involve a wide variety of business actions, as we mentioned above. For each of those actions, businesses would face an additional direct and indirect cost of litigation—the tax—if those actions were similar to actions taken by one or more competitors. The tax is (roughly) equal to the additional probability of being sued times the cost of litigation if sued. For many small and medium-sized firms, the tax would probably be quite small, because the probability that any such firm would be sued on the basis of parallel conduct would be low. It would be unlikely for relatively small firms either to write a large check to settle the case or in fact to be guilty of conspiracy to restrain trade. (The tax probably would not be zero, however, since plaintiffs could, at little cost, add a conspiracy charge to many garden-variety claims.) On the other hand, for the large firms that account for the bulk of gross domestic product, the tax could be significant. Such firms face a significant likelihood of being sued, and the cost of litigating an antitrust case in terms of lost management time is likely to be significant.

This tax will tend to discourage firms from taking the sorts of efficient actions that make up dynamic competition. Firms compare the costs and benefits of taking actions. The tax makes the costs of certain kinds of actions higher. Imposing it, therefore, will lead firms not to take certain efficiency-enhancing actions. The tax will, in particular, tend to discourage firms from engaging in the imitative behavior that underlies the diffusion of information and technology in the marketplace. In addition, because the "parallel behavior is enough" standard can be applied to the parallel failure to take actions, firms will be encouraged to take some actions that they might not have otherwise taken.

The overall effect of the tax on the economy is based on summing the effect of the tax on discouraging efficient business behavior across all firms in all markets that would be

affected by the "parallel behavior is enough" standard. We would expect that most large firms that do business nationally would be subject to the tax if the Second Circuit decision stands, because plaintiffs would seek to file cases with claims of conspiracy in restraint of trade in that circuit. The efficiency losses resulting from adopting the "parallel behavior is enough" standard would also need to be summed over time for as long as this standard remained law in the Second Circuit or other circuits.

Thus, the costs of the "parallel behavior is enough" standard would very likely be substantial even if it remains the law only in the Second Circuit. Therefore, we believe that it is both important and urgent for the Court to consider the benefits and costs of the alternative dismissal rules for a conspiracy in restraint of trade.

VI. THE "PLUS FACTOR" STANDARD STRIKES A REASONABLE BALANCE BETWEEN DETECTING AND DETERRING CONSPIRACIES AND LIMITING THE INCENTIVES OF FIRMS TO ENGAGE IN NORMAL PRO-COMPETITIVE BEHAVIOR

The "plus factor" standard would seem to us, as economists, to impose a low hurdle for plaintiffs that wish to pursue a claim of conspiracy in restraint of trade in violation of Section 1 of the Sherman Act. Plaintiffs need only allege facts that would tend to exclude the possibility of independent action to survive a motion to dismiss a claim of conspiracy. The plaintiffs would not have the burden of proffering evidence of an actual conspiracy, and neither the court nor the defendant could question the facts. Plaintiffs would, however, be required to explain both why the alleged behavior is likely to result from collusion and, as a matter of economics, why

parallel conduct alone does not support such an explanation. Under the "plus factor" standard, the court is only permitted to assess whether that logical explanation tends to exclude the possibility that the alleged conspirators acted independently.[14] While we would need to engage in further analysis to assess some of the application of the "plus factor" standard by various circuits, particularly concerning the strength of the required "tendency to exclude," as a matter of first impression it would seem to strike a sensible balance because it requires plaintiffs to have facts that tend to suggest a conspiracy or some reason for the court to believe that the allegation of conspiracy is not simply a device to get to discovery. In any event, we endorse the "plus factor" approach as the more reasonable insofar as it recognizes that one must have more than "parallel behavior" for a credible claim of conspiracy in restraint of trade under Section 1 of the Sherman Act.

---

[14] *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

CONCLUSION

The Second Circuit's standard that parallel behavior is enough for plaintiffs to survive a motion to dismiss a claim of conspiracy under Section 1 of the Sherman Act presents an issue of economic policy to the Court, the resolution of which is both important and urgent. To adopt this standard or allow it to continue in force by denying certiorari, the Court would have to conclude that the benefits from detecting secret conspiracies is worth imposing a potentially significant tax on the dynamic process of competition along with potentially significant direct and indirect costs on the judiciary and firms.

Respectfully submitted.

R. HEWITT PATE
Counsel of Record
PAUL S. HAYES
HUNTON & WILLIAMS LLP
1900 K Street, N.W.
Washington D.C. 20006
(202) 955-1500

Counsel for Amici Curiae

APPENDIX

APPENDIX

List of *Amici*

William J. Baumol

Harold Price Professor of Entrepreneurship and Academic Director of the Berkeley Center for Entrepreneurial Studies
Stern School of Business, New York University

Michael J. Boskin[1]

Senior Fellow, Hoover Institution
T.M. Friedman Professor of Economics
Stanford University
Former Chairman, President's Council of Economic Advisers, 1989-1993

Robert W. Crandall

Senior Fellow, Economic Studies
Brookings Institution

Kenneth G. Elzinga

Robert C. Taylor Professor of Economics
University of Virginia

David S. Evans

Visiting Professor
Faculty of Laws, University College London

Gerald R. Faulhaber

Business and Public Policy Department
Professor of Business and Public Policy, Management, and Law
Wharton School, University of Pennsylvania
Former Chief Economist, Federal Communications Commission, 2000-2001

---

[1] Dr. Boskin is an expert on macroeconomics and public finance but has extensive experience in antitrust policy.

Franklin M. Fisher

Jane Berkowitz Carlton and Dennis William Carlton Professor of Economics, Emeritus
Massachusetts Institute of Technology
John Bates Clark Award for top economist under the age of 40, 1973

Luke Froeb

William Oehmig Associate Professor of Management
Vanderbilt University
Former Director, Bureau of Economics, Federal Trade Commission, 2003-2005

Richard J. Gilbert

Professor of Economics
University of California, Berkeley
Former Deputy Assistant Attorney General for Economics, U.S. Department of Justice, Antitrust Division, 1993-1995

Paul L. Joskow

Elizabeth and James Killian Professor of Economics and Management
Department of Economics and Sloan School of Management
Massachusetts Institute of Technology

Michael Katz

Sarin Professor of Strategy and Leadership
Haas School of Business and Department of Economics
University of California, Berkeley
Former Deputy Assistant Attorney General for Economic Analysis, U.S. Department of Justice, Antitrust Division, 2001-2003

Paul Milgrom

Leonard and Shirley Ely Jr. Professor of Economics
Stanford University

Thomas Gale Moore

Senior Fellow
Hoover Institution, Stanford University
Former Member, President's Council of Economic Advisers, 1985-1989

Robert S. Pindyck

Bank of Tokyo-Mitsubishi Professor of Economics and Finance
Sloan School of Management
Massachusetts Institute of Technology

Robert H. Porter

William R. Kenan, Jr. Professor of Economics
Northwestern University, Evanston, IL

Frederic M. Scherer

Aetna Professor Emeritus
John F. Kennedy School, Harvard University
Former Director, Bureau of Economics, Federal Trade Commission, 1974-1976

Richard Schmalensee

John C Head III Dean and Professor of Management and Economics
Sloan School of Management
Massachusetts Institute of Technology
Former Member, President's Council of Economic Advisers, 1989-1991

Marius Schwartz

Professor of Economics
Georgetown University, Department of Economics

Vernon L. Smith

Professor of Economics and Law
George Mason University
Nobel Prize winner in Economics, 2002

Edward A. Snyder

George Pratt Shultz Professor of Economics
Graduate School of Business, University of Chicago

A. Michael Spence

Senior Fellow, Hoover Institution
Philip H. Knight Professor Emeritus of Management
Graduate School of Business, Stanford University
Nobel Prize winner in Economics, 2001

Pablo T. Spiller

Jeffrey A. Jacobs Distinguished Professor of Business & Technology
University of California, Berkeley

Alan O. Sykes

Frank and Bernice Greenberg Professor of Law
University of Chicago, Law School

David J. Teece

Mitsubishi Bank Professor of International Business and Finance
University of California, Berkeley

Michael D. Whinston

Robert E. and Emily King Professor of Business Institutions
Northwestern University, Evanston, IL

(4)

No. 05-1126

IN THE

Supreme Court of the United States

BELL ATLANTIC CORPORATION, ET AL.,
Petitioners,

v.

WILLIAM TWOMBLY, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICI CURIAE E.I. DU PONT DE NEMOURS AND COMPANY AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF BELL ATLANTIC CORPORATION, ET AL.'S PETITION FOR A WRIT OF CERTIORARI

DONALD C. KLAWITER
Counsel of Record
J. CLAYTON EVERETT, JR.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 739-3000

Counsel for Amici Curiae

April 6, 2006

(additional counsel listed on inside cover)

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

THOMAS L. SAGER
Vice President, Assistant General Counsel and Director of Litigation
RAYMOND M. RIPPLE
E.I. du Pont de Nemours and Co.
1007Market St.
Wilmington, DE 19898

Counsel for Amicus Curiae
E.I. du Pont de Nemours and Co.

QUENTIN RIEGEL
Vice President Litigation & Deputy General Counsel
National Association of Manufacturers
1331 Pennsylvania Ave., NW, 6th Floor
Washington, DC 20004

Counsel for Amicus Curiae
National Association of Manufacturers

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

PRELIMINARY STATEMENT 2

DISCUSSION 4

I. THE SECOND CIRCUIT'S STANDARD CREATES AN OPEN INVITATION TO FILE UNMERITORIOUS ANTITRUST SUITS CHALLENGING PROCOMPETITIVE "PARALLEL" CONDUCT 5

II. ROBUST APPLICATION OF PLEADING STANDARDS IS PARTICULARLY IMPORTANT IN COMPLEX ANTITRUST CASES 8

III. THE SECOND CIRCUIT'S HOLDING CONFLICTS WITH THE LAW OF OTHER CIRCUITS AND IGNORES GOVERNING PRECEDENT OF THIS COURT. 13

CONCLUSION 14

TABLE OF AUTHORITIES

FEDERAL CASES

Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, 203 F.3d 1028 (8th Cir. 2000)..... 7

Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975)..... 11, 12

Briscoe v. LaHue, 663 F.2d 713 (7th Cir. 1981)..... 5

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993)..... 6, 14

In re Brand Name Prescription Drugs Antitrust Litig., No. 94-C897, 1995 U.S. Dist. LEXIS 8281 (N.D. Ill. June 13, 1995)..... 10

Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101 (7th Cir. 1984)..... 13

Carl Sandburg Village Condo. Assoc. No. 1 v. First Condo. Dev. Co., 758 F.2d 203 (7th Cir. 1985)..... 7

Cayman Exploration Corp. v. United Gas Pipe Line Co., 873 F.2d 1357 (10th Cir. 1989)..... 3, 13

Chao v. Rivendell Woods, Inc., 415 F.3d 342 (4th Cir. 2005)..... 7

DM Research, Inc. v. College of Am. Pathologists, 170 F.3d 53 (1st Cir. 1999) 3, 13

FTC v. Lukens Steel Co., 444 F. Supp. 803 (D.D.C. 1977) 9

In re Flat Glass Antitrust Litig., 385 F.3d 350 (3d Cir. 2004) 7

Garshman v. Universal Resources Holding, Inc., 641 F. Supp. 1359 (D.N.J. 1986) 13

In re Linerboard Antitrust Litig., 296 F. Supp. 2d 568 (E.D. Pa. 2003) 10

Kellam Energy, Inc. v. Duncan, 616 F. Supp. 215 (D. Del. 1985) 9

In re Microcrystalline Cellulose Antitrust Litig., 221 F.R.D. 428 (E.D. Pa. 2004) 9

Mid-America Reg'l Bargaining Ass'n v. Will County Carpenters District Council, 675 F.2d 881 (7th Cir. 1981) 5

Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984) 3, 11, 12, 13

Murphy Oil USA v. Fluor Daniel, Inc., No. 99-3564, 2002 WL 246439 (E.D. La. Feb. 19, 2002) 10

Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club, 419 F.3d 462 (6th Cir. 2005) 3, 13

Reiter v. Sonotone, 442 U.S. 330 (1979)..... 12

Rowe Entm't, Inc. v. William Morris Agency, Inc., 205 F.R.D. 421 (S.D.N.Y. 2002) 10

Sims v. Mack Truck Corp., 488 F.Supp. 592 (E.D. Pa. 1980)..... 6

Sutliff, Inc. v. Donovan Cos., 727 F.2d 648, 654 (7th Cir. 1984)..... 13

Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002) 7

TV Communications Network, Inc. v. ESPN, Inc., 767 F. Supp. 1062 (D. Colo. 1991).... 5, 6

Theatre Enters., Inc v. Paramount Film Distrib. Corp., 346 U.S. 537 (1954)..... 6, 14

MISCELLANEOUS

VI Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and their Application* § 1433 (e) (2002)..... 7

Peter M. Gerhart, *Report on the Empirical Case Studies Project to the National Commission for the Review of Antitrust Laws and Procedures, in 2 Report to the President and the Attorney General of the National Commission for the Review of Antitrust Laws and Procedures* (January 22, 1979)..... 10

Breck P. McAllister, *The Big Case: Procedural Problems in Antitrust Litigation*, 64 Harv. L. Rev. 27 (1950)..... 8

National Commission for the Review of Antitrust Laws and Procedures, 80 F.R.D. 509 (1979) 8

Recommendations of the American College of Trial Lawyers on Major Issues Affecting Complex Litigation, 90 F.R.D. 207 (1981) 8

Steven C. Salop, Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 Geo. L.J. 1001, 1011 (1986).. 10

William H. Wagener, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. Rev. 1887 (2003)..... 9

IN THE

Supreme Court of the United States

No. 05-1126

BELL ATLANTIC CORPORATION, ET AL.,
Petitioners,

v.

WILLIAM TWOMBLY, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICI CURIAE E.I. DU PONT DE NEMOURS AND COMPANY AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF BELL ATLANTIC CORPORATION, ET AL.'S PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF INTEREST

E.I. du Pont de Nemours and Company ("DuPont") is one of the largest and most diverse manufacturing firms in the world. The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. Collectively, *amici* and their members produce thousands of different products in

hundreds of different markets throughout the United States and around the world.

In some of these markets, there may be only a few significant competitors producing, marketing or selling competing products. In such markets, similar external factors often drive strategic decisions. Consequently, it is not unusual for all or most market participants to make similar independent decisions regarding competitive issues.

The Second Circuit's holding that antitrust plaintiffs need not plead "plus factors" in order to state a claim under Section 1 of the Sherman Act based on parallel conduct increases the risk of groundless, but nonetheless tremendously expensive, antitrust suits against multi-product and multinational companies, such as DuPont, and others that operate in competitive markets. More specifically, the decision below threatens to subject *amici*, and companies like them, to extremely expensive and burdensome discovery based solely on allegations of parallel conduct, despite the fact that parallel conduct is insufficient, standing alone, to ever establish antitrust liability. Defendants in such cases are put in a no-win situation. Even if the claims against them lack merit under governing antitrust precedent, they must either incur the tremendous expense of defending an antitrust lawsuit or settle the case to avoid this expense and potential harm to their reputation. Many, unfortunately, submit to the economic pressures and make what many see as the common sense decision to settle such lawsuits.

The petition raises important issues affecting wide segments of American industry. DuPont and NAM respectfully request the Court to grant the petition for a writ of certiorari in this case.[1]

---

[1] DuPont and NAM sought and received consent from all parties to file this brief in support of the petition for certiorari in this case, and those consents are on file with the Clerk. No party authored this brief in whole

PRELIMINARY STATEMENT

Although the Second Circuit's decision may appear at first blush to decide a dry procedural issue about pleading standards, it, in fact, threatens to undo much of the work of this Court and of the courts of appeal over the last thirty years in developing an effective antitrust law that promotes rather than impedes competition.

In order to assure that legitimate procompetitive conduct is not deterred, it is extremely important to differentiate the independent decisions of single firms—which are presumptively procompetitive—from agreements between horizontal competitors—which are inherently suspect and often illegal. It is for that reason that the antitrust laws require proof of so-called "plus factors" that tend to "exclude the possibility of independent action" as a basis for antitrust liability predicated on parallel conduct. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984). Penalizing parallel conduct in the absence of such "plus factors" threatens to "deter or penalize perfectly legitimate conduct." *Id.* Such conduct is the result of self-interested, independent decision making and, therefore, is perfectly legitimate and competitively beneficial.

As other Circuits have recognized, concerns about deterring procompetitive business conduct apply with as much force at the pleading stage as they do at later stages of the litigation process.[2] By opening the door to full scale

---

or in part, and no one other than *amici* and their members contributed financially to the preparation of this brief.

[2] *See Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357 (10th Cir. 1989) (requiring "plus factors" to be pleaded in support of a conscious parallelism claim); *Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462, 475 (6th Cir. 2005) (requiring allegations of "plus factors" in antitrust conspiracy case); *DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53 (1st Cir. 1999) (requiring allegations of "plus factors" or other facts in support of antitrust conspiracy claim).

antitrust discovery based solely on allegations of parallel conduct, the Second Circuit's standard threatens to penalize firms for engaging in perfectly legitimate conduct (a) that is common and inevitable in many markets, (b) that is expressly appropriate under relevant antitrust jurisprudence and (c) that benefits consumers.

Robust pleadings standards are thus particularly important in complex antitrust cases. Because of the enormous costs and burdens associated with discovery in antitrust litigation, the pleading standard adopted by the Second Circuit in this case creates incentives for firms to forego making procompetitive, profit maximizing business decisions based on concerns about antitrust litigation. Even claims that have a very low probability of success often lead to "hold up" settlements based on litigation costs instead of the merits of the underlying claims. Such settlements benefit only a small handful of plaintiffs and their counsel, at the expense of the federal court system and consumers in general. Although the pleading standards of the Federal Rules of Civil Procedure are intended to be liberal, they are also intended to serve at least some gatekeeper role, separating legitimate claims from those that have no prospect of success. The standard applied by the Second Circuit in this case, however, abdicates that role. It permits claims to proceed on the basis of alleged facts that, even if proved, would be insufficient to establish a basis for relief under the Sherman Act.

Review by this Court is necessary to reverse the Second Circuit's error, to resolve the split among the Circuits regarding pleading standards for antitrust claims based on "conscious parallelism," and to avoid flooding the federal courts with antitrust suits challenging lawful parallel conduct.

DISCUSSION

Although characterized as only a procedural issue of pleading requirements, this case has major impacts and costs on the parties to antitrust litigation. The Second Circuit's opinion opens the floodgates to full scale "fishing expedition" discovery in cases involving conduct that is explicitly permissible under governing precedent from this Court. Once they survive a motion to dismiss under Rule 12(b)(6), antitrust plaintiffs are permitted to impose enormous discovery burdens and costs on defendants—a penalty far in excess of many judgments.

Subsequent substantive screens at the summary judgment and trial stages cannot remedy the huge costs imposed during the discovery phase. Even for a moderate sized antitrust case, such costs will be several million dollars. Plaintiffs must be required to plead sufficient facts to differentiate legitimate "conscious parallelism" from illegitimate horizontal agreements in restraint of trade.

I. THE SECOND CIRCUIT'S STANDARD CREATES AN OPEN INVITATION TO FILE UNMERITORIOUS ANTITRUST SUITS CHALLENGING PROCOMPETITIVE "PARALLEL CONDUCT."

According to the Second Circuit, an antitrust conspiracy complaint is sufficiently stated if it alleges (1) that the defendants made similar parallel business decisions and (2) that those decisions were part of a "conspiracy." Because allegations of "conspiracy" are legal conclusions that need not be credited at the pleading stage,[3] however, the Second

---

[3] *See Mid-America Reg'l Bargaining Ass'n v. Will County Carpenters District Council*, 675 F.2d 881, 886 (7th Cir. 1981) ("Mere 'conclusory allegations unsupported by any factual assertions will not withstand a motion to dismiss.'") (quoting *Briscoe v. LaHue*, 663 F.2d 713, 723 (7th Cir. 1981)); *TV Communications Network, In. v. ESPN,*

Circuit's decision effectively stands for the proposition that parallel conduct, standing alone, provides sufficient grounds for an antitrust complaint—and for full scale antitrust discovery.

Yet, this Court and several federal appellate courts have long held that "parallel conduct" is often legitimate and proper competitive behavior. Market participants faced with similar competitive threats, sources of raw material supply or market conditions and presented with similar information regularly act in a similar manner. In many industries, similar external supply and demand factors may lead firms independently to make similar decisions regarding pricing or supply.

At the same time, in markets with relatively few participants, the same business opportunity may simultaneously be presented to multiple different competitors. Some or all of those competitors may have independent business reasons for declining that opportunity—due to capital requirements, risk profiles, competing investment opportunities and other factors.

Under this Court's precedents, such "parallel conduct," standing alone, is insufficient to establish an antitrust violation.[4] A plaintiff's ability to prove the existence of at

---

Inc., 767 F.Supp. 1062, 1070 (D. Colo. 1991) (In reviewing a motion to dismiss, the court stated that "fleeting and conclusory allusions to conspiracies are simply insufficient as a matter of law.") (quoting *Sims v. Mack Truck Corp.*, 488 F.Supp. 592, 607 (E.D.Pa.1980)).

[4] *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993)("conscious parallelism, ... [is] not in itself unlawful, [even though, the] firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions."); *Theatre Enters, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954) ("[C]ircumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward

least one "plus factor" is a necessary precondition to liability in a conscious parallelism case.[5] Thus, plus factors must be alleged to satisfy the notice pleading requirements of Rule 8 and to avoid dismissal under Rule 12(b)(6).[6] No higher, or heightened, pleading requirements are necessary to exclude complaints alleging solely that defendants engaged in "consciously parallel" conduct.[7]

By allowing this case to proceed to discovery despite the absence of "plus factor" allegations, the Second Circuit effectively lowered the pleading standard for antitrust cases challenging parallel conduct. This is an open invitation for meritless suits brought to extract "hold up" settlements rather than to vindicate rights protected by the antitrust laws. Antitrust plaintiffs can impose huge discovery costs on defendant companies simply by alleging conduct that is common, perfectly legal and often procompetitive. These

---

conspiracy; but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely.").

[5] *See, e.g., In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360 (3d Cir. 2004) ("[W]e have required that plaintiffs basing a claim of collusion on inferences from consciously parallel behavior show that certain "plus factors" also exist.); *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1033 (8th Cir. 2000) ("An agreement is properly inferred from conscious parallelism only when certain "plus factors" exist."); VI Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and their Application* § 1433 (e) (2002) (The term "plus factors" refers to "the additional facts or factors required to be proved as a prerequisite to finding that parallel action amounts to a conspiracy.").

[6] *See, e.g., Chao v. Rivendell Woods, Inc.*, 415 F.3d 342, 348 (4th Cir. 2005) ("[A] complaint meets Rule 8's requirements if, in light of the nature of the action, the complaint sufficiently alleges each element of the cause of action so as to inform the opposing party of the claim and its general basis."); *Carl Sandburg Vill. Condo. Assoc. No. 1 v. First Condo. Dev. Co.*, 758 F.2d 203, 207 (7th Cir.1985) ("[T]o survive a motion to dismiss a complaint must state either direct or inferential allegations concerning all of the material elements necessary for recovery....").

[7] Thus, the Second Circuit's reliance on *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), is misplaced.

discovery costs, as discussed further below, are often greater than actual recoveries, even in cases that have some ultimate merit under governing antitrust precedent. Without robust pleadings standards to separate the wheat from the chaff – as "plus factors" are intended ultimately to do – there is nothing to dissuade the filing of antitrust suits based solely on the thin – and legally untenable – reed of perceived parallel behavior.

II. ROBUST PLEADING STANDARDS ARE PARTICULARLY NECESSARY IN COMPLEX ANTITRUST CASES.

Antitrust cases are notoriously burdensome and expensive to litigate.[8] Antitrust cases, and particularly antitrust *conspiracy* cases under Section 1 of the Sherman Act, generally require a searching evaluation of all aspects of the market at issue to determine whether competition in that market has been undermined or distorted by the conduct challenged in the suit. Thus, under the broad terms of Federal Rule of Civil Procedure 26, a huge array of documents, in electronic or hard-copy format, relating to pricing, product quality, product initiatives, marketing, sales, labor and union issues, budgets and other financial information, board materials, and many others are commonly discoverable.

Discovery often also extends to documents relating to the personal schedules, calendars, and communications of company executives, officials, directors, and sales and marketing employees as these documents may be used as evidence of communications with competitors. In the age of

---

[8] *See generally Report to the President and the Attorney General of the National Commission for the Review of Antitrust Laws and Procedures*, 80 F.R.D. 509 (1979); *Recommendations of the American College of Trial Lawyers on Major Issues Affecting Complex Litigation*, 90 F.R.D. 207 (1981); Breck P. McAllister, *The Big Case: Procedural Problems in Antitrust Litigation*, 64 Harv. L. Rev. 27 (1950).

e-mail, virtually every e-mail message of every mid-level and senior manager is at the center of the discovery process. In essence, antitrust defendants must open and produce virtually all of their files relating to the market at issue in order to comply with the mandates of Rule 26(b)(1) that allows discovery of all information relevant to a claim or defense of any party that is "reasonably calculated to lead to the discovery of admissible evidence."[9] Meanwhile, civil antitrust plaintiffs often have little incentive to limit discovery demands because the volume of documents in their possession related to the litigation and, therefore, potentially subject to retaliatory document requests by the defendants, is *de minimis*.[10]

The defendant's employees, including mid-level and senior managers, also must submit to time-consuming and costly depositions where they may be questioned at length about their e-mail files or their business operations. This process can be a major distraction to the company's ongoing business operations. With the advent of electronic discovery, the costs of antitrust litigation have increased dramatically in

---

[9] *See, e.g., FTC v. Lukens Steel Co.*, 444 F. Supp. 803, 805 (D.D.C. 1977) ("The discovery rules should normally be liberally construed ... in antitrust cases."); *Kellam Energy, Inc. v. Duncan*, 616 F.Supp. 215, 217 (D. Del. 1985)("[T]here is a general policy of allowing liberal discovery in antitrust cases ... [p]articularly where allegations of conspiracy or monopolization are involved."); *In re Microcrystalline Cellulose Antitrust Litig.*, 221 F.R.D. 428, 430 (E.D. Pa. 2004) ("[S]ome courts have also held that a broad scope of discovery is particularly appropriate in antitrust litigation because, for example, relevant business documents pertaining to the antitrust conspiracy may not exist and covert behavior may have to be proven through less direct means.").

[10] *See* William H. Wagener, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. Rev. 1887 (2003) (Wagener lists the substantial asymmetry of discovery costs in civil antitrust cases as one factor which makes such cases particularly susceptible to abuse by opportunistic plaintiffs.)

recent years, as have the costs of economic experts who are regularly required in antitrust conspiracy litigation.[11]

The U.S. District Court for the Southern District of New York estimated in a recent antitrust case that the cost of producing electronic discovery—only a *portion* of the discovery "pie"—would run nearly $10 million dollars. *See Rowe Entm't, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 425 (S.D.N.Y. 2002). In *Murphy Oil USA v. Fluor Daniel, Inc.*, No. 99-3564, 2002 WL 246439 (E.D. La. Feb. 19, 2002), the defendant's estimated cost to restore and print responsive e-mail from 93 backup tapes using procedures which the court recognized as bearing some similarity to those described in *Rowe* exceeded $6 million. In many cases, the costs of discovery in antitrust cases far exceed the costs of verdicts or settlements in those cases.[12]

As a result, there is tremendous pressure to settle antitrust cases that are able to surmount the initial pleading hurdle.[13]

---

[11] Even prior to the advent of e-mail in the corporate workplace, antitrust discovery was extraordinarily far-reaching. Even in the 1970s, for instance, IBM produced over 1300 witnesses for deposition and 31 million pages of documents in response to antitrust suits challenging its business practices that arose out of a single government investigation. *See* Peter M. Gerhart, *Report on the Empirical Case Studies Project to the national Commission for the Review of Antitrust Laws and Procedures, in 2 Report to the President and the Attorney General of the National Commission for the Review of Antitrust Laws and Procedures* at 21-22 (Jan. 22, 1979) (hereinafter "Empirical Case Studies Project").

[12] *See also In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94-C897, 1995 U.S. Dist. LEXIS 8281, at *2 (N.D. Ill. June 13, 1995) (ordering compilation and review of 30 million pages of e-mail); *In re Linerboard Antitrust Litig.*, 296 F.Supp.2d 568, 577 (E.D. Pa. 2003) (pretrial discovery required production of millions of pages of documents). *Empirical Case Studies Project* at 19-21 (identifying additional antitrust cases where participants reported producing "millions" of pages of documents and witnesses for hundreds of deposition days).

[13] Steven C. Salop, Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 Geo. L.J. 1001, 1011 (1986).

Antitrust settlements are often driven more by avoiding the costs of further litigation and the time expended in its preparation than by the merits of the claims at issue.

The undesirable effect of allowing meritless claims to proceed through the judicial system has been of grave concern to this Court. *See, e.g., Monsanto*, 465 U.S. at 763-64. To avoid this adverse outcome, courts must be permitted to dismiss, prior to the discovery stage, claims that fail to allege the elements this Court has required plaintiffs to prove in order to succeed at trial or withstand a summary judgment motion.

In *Blue Chip Stamps v. Manor Drug Stores*, this Court recognized this potential for abuse, concluded that the avoidance of nuisance and harassment suits is a legitimate and important concern at the pleading stage, at least in complex cases, and noted with approval the use of motions to dismiss to address such concerns. 421 U.S. 723, 739-43 (1975). It recognized that, in class actions brought under Securities and Exchange Commission Rule 10b-5,

> [t]he potential for abuse of the liberal discovery provisions of the Federal Rules of Civil Procedure may ... exist ... to a greater extent than they do in other litigation. [In these cases,] the mere existence of an unresolved lawsuit has settlement value to the plaintiff, not only because of the possibility that he may prevail on the merits, an entirely legitimate component of settlement value, but because of the threat of extensive discovery and disruption of normal business activities which may accompany a lawsuit which is groundless in any event, but cannot be proved so before trial. *Id.*, at 742-43.

To the extent that the Federal Rules and the discovery process are used for the purpose of harassment, they are a "social cost rather than a benefit." Thus, the Court urged

trial courts to use motions to dismiss and motions for summary judgment to prevent this occurrence. *Id.*

Blue Chip Stamps echoes far beyond the narrow context in which it arose. The very same potential for the abuses of discovery described by the Court in Rule 10b-5 cases exists in private antitrust cases, where the burdens of discovery and disruption of normal business activities are tremendous and the incentive to bring groundless claims in hopes of extracting a settlement are substantial. *See, e.g., Reiter v. Sonotone*, 442 U.S. 330, 345 (1979) (discussing the need to "exercise sound discretion and use the tools available" to exclude meritless antitrust claims).

The laxity of the Second Circuit's pleading standard will inevitably lead companies to second-guess their business decisions and to ask (1) whether other competitors have made the same or similar decisions and (2) if so, whether the likely benefits of the decision outweigh the likely cost of defending an antitrust case through at least the summary judgment stage of litigation. As discussed above, that litigation "penalty" can be very substantial. It seems inevitable, therefore, that the Second Circuit's decision will skew business decisions, leading firms to forego innovative and procompetitive business opportunities or activities that they would otherwise explore. Competition and consumers cannot help but suffer.

In *Monsanto*, this concern motivated the Court's ruling that a plaintiff must adduce evidence regarding "plus factors" to survive a motion for summary judgment. *Monsanto*, 465 U.S. at 763-4. For the same reasons, it is appropriate to dismiss Section 1 complaints that rely solely on allegations of parallel conduct and do not allege any supporting facts that

would "tend to exclude the possibility of independent action." *See id*.[14]

III. THE SECOND CIRCUIT'S HOLDING CONFLICTS WITH THE LAW OF OTHER CIRCUITS AND IGNORES GOVERNING PRECEDENT OF THIS COURT.

Given these aspects of complex antitrust litigation, it is not surprising that courts in other circuits have concluded that "plus factors" must be alleged in support of antitrust claims predicated on parallel conduct.[15] Those cases, in contrast to the Second Circuit's decision in this case, are consistent with this Court's prior decisions regarding parallel conduct. As discussed above, this Court has repeatedly stated that parallel conduct, standing alone, cannot form the

---

[14] Other courts have justified requiring plaintiffs to allege other elements of their antitrust claims with some particularity by citing, *inter alia*, the particularly high cost of discovery in antitrust cases. *See, e.g.*, *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101 (7th Cir. 1984) (requiring allegations of fact which at least outline or adumbrate a violation of the Sherman Act because "the costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery ... when the requisite elements are lacking."); *Garshman v. Universal Res. Holding, Inc.*, 641 F. Supp. 1359, 1367 (D.N.J. 1986)("the heavy costs of modern federal litigation, especially antitrust litigation, and the mounting caseload pressure on the federal courts," militate in favor of requiring some reasonable particularity in pleading violations of the federal antitrust laws.") (quoting, as does *Car Carriers, Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 654 (7th Cir. 1984)).

[15] *See Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357 (10th Cir. 1989) (requiring "plus factors" to be pleaded in support of a conscious parallelism claim); *Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462, 475 (6th Cir. 2005)(same); *DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53 (1st Cir. 1999) (requiring allegations of "plus factors" or other facts in support of antitrust conspiracy claim).

basis for an antitrust violation.[16] The deep and abiding split among the circuits can only be resolved by this Court.

The Court should grant the petition for a writ of certiorari to bring the Second Circuit's law into line with the law of the First, Sixth and Tenth Circuits and with the rationale of this Court's prior decisions dealing with parallel conduct.

CONCLUSION

Review by this Court is necessary to ensure that the Second Circuit's error in failing to require allegations of "plus factors" in antitrust cases challenging "consciously parallel" conduct does not burden the amici, other U.S. businesses and the courts with a rash of meritless antitrust claims, nor chill procompetitive independent conduct by businesses operating in all U.S. industries.

Respectfully submitted,

DONALD C. KLAWITER
Counsel of Record
J. CLAYTON EVERETT, JR.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 739-3000

Counsel for Amici Curiae

---

[16] *See Theatre Enters.*, 346 U.S. at 541 ("But this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense."); *Brooke Group*, 509 U.S. at 227 ("Tacit collusion, sometimes called oligopolistic price coordination or conscious parallelism, describes the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions.").

THOMAS L. SAGER
Vice President, Assistant General Counsel and Director of Litigation
RAYMOND M. RIPPLE
E.I. du Pont de Nemours and Co.
1007 Market St.
Wilmington, DE 19898

Counsel for Amicus Curiae
E.I. du Pont de Nemours and Co.

QUENTIN RIEGEL
Vice President Litigation & Deputy General Counsel
National Association of Manufacturers
1331 Pennsylvania Ave., NW
6th Floor
Washington, DC 20004

Counsel for Amicus Curiae
National Association of Manufacturers

APRIL 6, 2006

(10)

No. 05-1126

Supreme Court, U.S.
FILED
APR 6 - 2006
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BELL ATLANTIC CORPORATION, *ET AL.*,
Petitioners,

v.

WILLIAM TWOMBLY, *ET AL.*, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR *AMICUS* IN SUPPORT OF PETITIONERS

MARK FUCHS
GENERAL COUNSEL
LOUISIANA-PACIFIC CORP.
414 Union St.
Suite 2000
Nashville, Tennessee 37219
(615) 986-5600

PAUL H. FRIEDMAN
Counsel of Record
REBECCA P, DICK
DECHERT LLP
1775 Eye St., N.W.
Washington, DC 20006
(202) 261-3300

Counsel for Amicus

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Amicus Louisiana-Pacific Corp. will address: Whether allegations of parallel conduct by the defendants, without more, suffice to state a claim of conspiracy in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, when it is settled law that proof of parallel conduct without more would not entitle the plaintiff to relief?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF *AMICUS CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	3
REASONS FOR GRANTING *CERTIORARI*	6
I. THE DECISION BELOW THREATENS TO PUNISH FIRMS IN COMMODITY BUSINESSES FOR PROCOMPETITIVE RESPONSES TO MARKET CONDITIONS	6
II. MODERN ANTITRUST LITIGATION IS INTRUSIVE, DISRUPTIVE, AND EXPENSIVE	9
III. THE DECISION BELOW ERODES A FUNDAMENTAL DISTINCTION IN THE SHERMAN ACT BETWEEN UNILATERAL AND CONCERTED ACTION	11
IV. THE DECISION BELOW INCORRECTLY APPLIES THE FEDERAL PLEADING RULES	13
CONCLUSION	15

TABLE OF AUTHORITIES

CASES Page

Associated General Contractors v. California State Council of Carpenters, 459 U.S. 519 (1983) 14
Car Carriers, Inc. v. Ford Motor Corp., 745 F.2d 1101 (7th Cir. 1984) 15
DM Research, Inc. v. College of American Pathologists, 170 F.3d 53 (1999) 13, 14
Dura Pharmaceuticals, Inc. v. Broudo, 125 S. Ct. 1627 (2005) 12
Evans v. Pearson Enterprises, Inc., 434 F.3d 839 (6th Cir. 2006) 10
In re Flat Glass Litigation, 385 F.3d 350 (3d Cir. 2004) 12
Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 6, 12, 13
Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984) 5, 12
Stachowski v. Town of Cicero, 425 F.3d 1075 (7th Cir. 2005) 10
Swierkiewicz v. Sorema, 534 U.S. 506 (2002) 13
Theatre Enters., Inc. v. Paramount Film Distrib. Corp. 346 U.S. 537 (1954) 7
United States v. Colgate & Co., 250 U.S. 300 (1919) 12
Williamson Oil Co., Inc. v. Philip Morris USA, 346 F.3d 1287 (11th Cir. 2003) 13

STATUTES

15 U.S.C. § 1 ..... 5, 7, 11
15 U.S.C. § 2 ..... 5, 11
15 U.S.C. § 18a 9

TABLE OF AUTHORITIES

OTHER AUTHORITIES — Page

Federal Rule of Civil Procedure 8(a) ..... *passim*
Federal Rule of Civil Procedure 12(b)(6) ..... *passim*
P. Areeda and H. Hovenkamp, VI Antitrust Law ¶¶ 1402, 1405 (2d ed. 2003) 7, 11
S. Gawlicki, "GCs Find New Ways to Cut Discovery Costs," *Inside Counsel.com* (Dec. 1, 2005), *available at* http://www.insidecounsel.com/issues/ insidecounsel/15_169/technology/236-1.html 9
Comment of M. Kirk, American Intellectual Property Law Association, to the Antitrust Modernization Commission, (July 25, 2005), *available at* http://www.amc.gov/public_studies_fr28902/new_economy_pdf/05725_AIPLA-New% 20Economy.pdf 10
S. Sher and D. Teshima, "e-Normous: The Increasing Burden Associated with Electronic Document Production in Second Request Investigations," *Antitrust Source* (November 2005), *available at* http://www.wsgr.com/PDFSearch/sher1105.pdf 9

IN THE

Supreme Court of the United States

No. 05-1126

BELL ATLANTIC CORPORATION, *ET AL.*,
Petitioners,

v.

WILLIAM TWOMBLY, *ET AL.*, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR *AMICUS* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE* [1]

The adverse effects of the decision below extend well beyond the telecommunications industry. Firms like *amicus* Louisiana-Pacific Corporation, which compete in commodity businesses, are most likely to feel the full force of this decision because competitive behavior in commodity businesses is quite often parallel: when a service station on one corner of

[1] No one other than the named *amicus* wrote this brief in whole or in part, or made any monetary contribution to its preparation. The parties' written consents to the filing of this brief are being filed with the Clerk herewith.

an intersection changes its prices, a perfectly competitive, unilateral response of a service station on the opposite corner is to follow suit. All will agree that such behavior is perfectly lawful under the Sherman Act. Nevertheless, under the Second Circuit's decision below, allegations of such parallel action, coupled with the bald assertion that the two service stations conspired to raise prices, is sufficient to survive a motion to dismiss.

The standard articulated by the Second Circuit is wrong. Unless reversed, the decision below will have a chilling effect on procompetitive behavior in commodity markets. Firms will hesitate before responding to market conditions the same way a competitor has done even though that may be the best competitive choice. Frivolous lawsuits will clog the courts and burden firms that are guilty of nothing more than competing vigorously. These taxes on competition serve no useful purpose.

Amicus Louisiana-Pacific Corporation is a leading manufacturer of home building products in North America. Its most significant product, oriented strand board, or "OSB," is sold as a commodity for which sales prices fluctuate daily based on market factors over which it has little or no control. OSB is an innovative, affordable, and environmentally smart product made from wood strands arranged in layers and bonded with resin. OSB serves many of the same uses as unsanded plywood, including roof decking, sidewall sheathing, and floor underlayment, but it can be produced at significantly lower cost than plywood. In 2004, North American sales of OSB structural panels totaled approximately 26 billion square feet. Louisiana-Pacific believes it is the largest and one of the most efficient producers of OSB in North America.

Amicus Louisiana-Pacific has fresh experience with meritless antitrust claims based solely on allegations of parallel conduct. In February and March, 2006, Louisiana-Pacific

was one of eight defendants named in multiple complaints alleging—solely on the basis of parallel conduct—a conspiracy among producers of OSB to curtail OSB production and to fix prices. *Amicus* Louisiana-Pacific is committed to compliance with the law. It believes these claims are without merit, and will vigorously defend these matters in the appropriate courts.

If the standard articulated by the Second Circuit stands, it will become difficult for law-abiding firms that sell commodity products to defeat frivolous claims on a motion to dismiss. Those firms will be forced to endure full-blown discovery when, under Rule 8(a) and the plus-factors analysis followed in other circuits, the case should have been dismissed for failure to state a claim under Fed. Rule Civ. P. 12(b)(6). For these reasons, Louisiana-Pacific urges the Court to grant *certiorari* and reverse.

INTRODUCTION AND SUMMARY OF ARGUMENT

Firms that sell commodity products like OSB compete primarily on price. Price-focused competition forces such firms to be efficient or fail. The price of commodity products at any point in time is largely a function of the relationship between supply and demand. Since commodity suppliers typically face similar supply and demand forces, it is neither surprising nor unlawful for one seller of a commodity product to undertake strategic conduct that is similar to the conduct of one of its competitors. The competitors may unilaterally decide to increase or decrease price, or expand or contract capacity, at about the same time, given that they are both responding to similar market conditions.

In many of these businesses, buyers and sellers rely to a considerable extent on public information about supply, demand, and prices. Information about past prices is often essential to the efficient operation of commodity markets. Similarly, economic forecasts of supply, demand, and price

are important planning tools for buyers and sellers in such markets. It should not be surprising that firms competing in the same business, with access to the same or similar market information, may choose to pursue the same or similar business strategies.

In commodity markets like those described above, it is easy for a plaintiff to find parallel business conduct. Of course, parallel conduct is not illegal under the antitrust laws. Yet, the decision below requires only that a plaintiff add the conclusory allegation "conspiracy" to the allegations of perfectly lawful parallel conduct to escape dismissal for failure to state a claim. This "standard" is no different than having no standard whatsoever.

Such a legal standard would lead to absurd outcomes. For example, if, while a firm is planning a particular action, a competitor takes similar action, the first firm must reevaluate its plans not only on the basis of changed market circumstances, but also on the likelihood of antitrust litigation if it proceeds with its original decision. Even worse, if the firm takes a particular action, whether it subsequently faces an antitrust challenge will depend in part on whether one of its competitors subsequently mimics its action—something over which the first firm has absolutely no control.

The Second Circuit itself recognized that its holding could distort the competitive landscape in unintended and unwanted ways. For example, a firm may forgo a competitive move it considers advisable and follow a less promising path simply to avoid litigation. If instead the firm makes the business move it prefers and is then sued, the costs of antitrust litigation will be daunting. The time and expense consumed by an antitrust case continue to grow dramatically, now augmented by the technically complex and costly processes for discovery of electronic records. While statistics are difficult to find, those available show that antitrust discovery imposes a significant financial burden on a company and a serious manage-

ment burden on its executives. Indeed, the Second Circuit acknowledged that the prospect of antitrust litigation creates a powerful incentive for defendants to settle even unmeritorious claims, and the court's empty standard for Rule 12(b)(6) dismissal ensures that this incentive will be felt by more and more firms. The Second Circuit's "standard" furthers neither the deterrent nor the compensation policies that underlie the antitrust private right of action. To the contrary, the standard articulated below inappropriately burdens procompetitive behavior in a way that is certain to lead to a diminution in competition. This is the very antithesis of what the antitrust laws are intended to foster.

In addition to the inefficiencies and perverse incentives created by the decision below, it erodes a fundamental distinction in the Sherman Act: the sharply different treatment of unilateral and collective action. The competitive danger of collusive action was deemed by Congress to be so great that it subjected all anticompetitive agreements between two or more firms to antitrust attack. In contrast, Congress deemed the risk of mistakenly deterring aggressive unilateral competition sufficiently great that it prohibited only unilateral conduct that threatens monopolization. Unilateral conduct receives much more lenient treatment than collective conduct so that firms that act unilaterally are not discouraged by the antitrust laws from competing vigorously.

Other circuits have recognized the risk of inappropriately discouraging procompetitive, unilateral behavior and have held that allegations of conspiracy based on parallel conduct alone are not sufficient to state a claim for relief. Those circuits require that antitrust allegations of parallel conduct be complemented by specific allegations that, if proved, would tend to exclude the possibility that defendants acted independently. The decision below adopts a standard that is inconsistent with modern antitrust jurisprudence and, instead, relies on a 1950s-era decision that preceded this Court's decisions in *Monsanto*

and *Matsushita*. If not reversed, the decision below will deter procompetitive conduct by imposing a heightened risk of "false positives" on the defendants. The decision below misapplies this Court's teaching on the Sherman Act and on the pleading rules.

The undesirable and anticompetitive effects of the decision below are potentially far-reaching. The *Twombly* case involves markets with a long history of extensive regulation. Other types of industries will be adversely affected as well. For example, as described herein, the decision below poses significant challenges for firms wishing to compete vigorously selling commodity products. It has the potential to adversely affect a sizeable segment of the nation's economy.

REASONS FOR GRANTING *CERTIORARI*

I. THE DECISION BELOW THREATENS TO PUNISH FIRMS IN COMMODITY BUSINESSES FOR PROCOMPETITIVE RESPONSES TO MARKET CONDITIONS

OSB, Louisiana-Pacific's most significant product, is sold as a commodity. Customers choose a supplier largely based on price, availability, and location. Customers can and do switch suppliers easily in order to obtain the best terms available. Like most commodity products, when supply is high relative to demand, prices are lower. When supply is low relative to demand, prices are higher. These supply and demand pressures apply to all North American suppliers of OSB. The principal use of OSB is for housing. When home construction is strong, so is the demand for OSB. When housing starts soften, so does the demand for OSB. Like many other commodity products, suppliers of OSB can be expected to monitor closely both capacity and demand for their products. It should come as no surprise that, when capacity exceeds demand, many firms consider reducing capacity or delaying capacity expansion, and as a matter of

fact, many will limit production or delay investing in new capacity. Such behavior is not surprising to antitrust scholars, nor is it illegal. As the leading antitrust treatise explains,

> parallel conduct is often forced by circumstance: under such circumstances a 'rational' profit-maximizing firm will always act in a way that is similar to its rivals.

P. Areeda and H. Hovenkamp, VI Antitrust Law ¶ 1405 at 21 (2d ed. 2003) ("Areeda & Hovenkamp"). For this reason among others, parallel conduct does not violate the Sherman Act. *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.* 346 U.S. 537, 541 (1954).

As is true with many commodity products that are essentially traded on price, both buyers and sellers of OSB have available to them considerable public information about recent prices and about capacity expansions and contractions in the marketplace. This information enables buyers and sellers lawfully and intelligently to make their own business decisions based on publicly available supply, demand, and price information.

It should come as no surprise, then, that a plaintiff will frequently be able to allege that commodity suppliers followed one another on price and/or output decisions at about the same time, sometimes with knowledge that their competitors had recently made the same moves. There can be no doubt that firms that sell commodity products often make parallel decisions. But that fact, by itself, cannot support a claim of conspiracy under Section 1 of the Sherman Act. The procompetitive response of firms facing the same supply and demand forces may often be to act in similar or even the same ways. This response, when taken unilaterally, is perfectly lawful. Yet, under the standard adopted by the court below, a plaintiff would need only add the word "conspiracy" to its complaint to activate the extortionate power of the American discovery system.

As a practical matter, the standard set by the Second Circuit will make it difficult for firms situated like Louisiana-Pacific to compete vigorously and to run their businesses efficiently without incurring unwarranted and unreasonable antitrust risk. The decision increases the likelihood and frequency of their facing no-win choices. For example, Company A may make a tactical or strategic move that its competitor, Company B, also wants to make, but Company A announces its action first. If Company B nevertheless proceeds with its own unilateral plans, a plaintiff may allege that this parallel conduct must be due to conspiracy. Under the decision below, a motion to dismiss such a complaint might fail even though, if the plaintiff proved the facts alleged, the defendant would be entitled to judgment as a matter of law. In those circumstances, Company B's alternative to risking a frivolous antitrust suit is to abandon the move it considers wisest and undertake another whose chief merit may be that it is different from what any other market participant has chosen to do. The antitrust laws do not demand such foolishness.

Nor can Company B solve this conundrum by always being the first to act in response to a market development. Even the first mover, acting completely unilaterally, is vulnerable to private antitrust litigation under the decision below. Whether it will subsequently face an antitrust claim is entirely out of its hands—instead, it depends in part on whether a competing supplier takes similar action in response to the same market forces.

The Second Circuit itself acknowledged that the rule it adopted will contribute to inefficiency and frivolous litigation. Pet. App. 30a. That ought to be a giveaway that the decision below is wrong: a statute whose purpose is to promote the most efficient allocation of resources through competition instead promotes inefficiency and stifles competition.

II. MODERN ANTITRUST LITIGATION IS INTRUSIVE, DISRUPTIVE, AND EXPENSIVE

The Second Circuit conceded that its ruling would subject defendants in some frivolous cases to needless antitrust discovery. The Second Circuit maintained that it was helpless to do otherwise (relying on a mistaken reading of this Court's precedent), and suggested that Congress or this Court might appropriately intervene to prevent that result. Pet. App. 30a. This Court's intervention is warranted because it is essential to correct the Second Circuit's error before a single firm is subjected to antitrust discovery over a frivolous claim.

Empirical data about the costs of discovery in antitrust litigation is limited, but these costs are widely perceived to be growing at an exponential rate. A major law firm's annual study of litigation trends recently named electronic discovery as the biggest new litigation burden for large companies. S. Gawlicki, "GCs Find New Ways to Cut Discovery Costs," *Inside Counsel.com* (Dec. 1, 2005), *available at* http://www.insidecounsel.com/issues/insidecounsel/15_169/technology/236-1.html.

The scope and costs of compliance with a request for additional information from the government in a premerger investigation pursuant to the Hart-Scott-Rodino Act, 15 U.S.C. § 18a, may offer a reasonable proxy for discovery costs in private antitrust litigation. By one anecdotal measure of five investigations between 2001 and 2005, the volume of electronic data that had to be collected from each searched employee grew steadily from 0.74 gigabytes to 7.08 gigabytes—an increase of nearly 970% in about four years. S. Sher and D. Teshima, "e-Normous: The Increasing Burden Associated with Electronic Document Production in Second Request Investigations," *Antitrust Source* at 2 (November 2005), *available at* http://www.wsgr.com/PDFSearch/sher1105.pdf. Because of advances in technological culling methods, the number of documents selected from the initial harvest for

subsequent review by attorneys for responsiveness to the government information requests grew by "only" 300% over the same four years. *Id.* at 11.

The growth in the burden of discovery shows no signs of abating. According to evidence provided to the Antitrust Modernization Commission, the median cost of litigating a patent infringement case through trial is now $4,000,000, and the top 25% of these cases cost about $6,000,000. Comment of M. Kirk, American Intellectual Property Law Association, to the Antitrust Modernization Commission, (July 25, 2005), *citing* American Intellectual Property Law Association, 2003 Report of the Economic Survey 94 tbl 22 (2003), *available at* http://www.amc.gov/public_studies_fr28902/new_economy_pdf/05725_AIPLA-New%20Economy.pdf. The figures for antitrust cases are likely in the same range.

As the Second Circuit recognized, the prospective cost of such discovery creates powerful incentives for defendants to settle even the most unmeritorious case. Pet. App. 30a. A legal standard that fails to differentiate meritorious from unmeritorious cases and, in so doing, subjects innocent parties to what the Second Circuit itself recognized to be potentially "extraordinary" litigation costs, Pet. App. 15a, cannot be the standard intended by the federal rules. Indeed, the Second Circuit's mistake was to ignore the requirement under Rule 12(b)(6) jurisprudence that the plaintiff benefit from ***reasonable*** inferences. The Second Circuit incorrectly gave the plaintiff below the benefit of ***any and all*** inferences, reasonable or not. This cannot be and is not the appropriate standard. *Evans v. Pearson Enterprises, Inc.*, 434 F.3d 839, 847 (6th Cir. 2006) ("[w]e must accept [plaintiff's] . . . factual allegations as true and construe all reasonable inferences in her favor . . . [but o]n the other hand, this liberal standard . . . requires more than recitation of bare legal conclusions"); *Stachowski v. Town of Cicero*, 425 F.3d 1075, 1078 (7th Cir. 2005) (""[w]e . . . [take] the facts pleaded as

true and [construe] all reasonable inferences in favor of the plaintiff . . . . [but] are not required . . . to accept assertions of law or unwarranted factual inferences").

III. THE DECISION BELOW ERODES A FUNDAMENTAL DISTINCTION IN THE SHERMAN ACT BETWEEN UNILATERAL AND CONCERTED ACTION

The Sherman Act treats unilateral conduct much more leniently than concerted action—indeed, unilateral conduct is not prohibited by the Act unless it threatens monopolization. 15 U.S.C. §§ 1, 2. The decision below blurs this important distinction, at least prior to summary judgment.

There are several closely related policy reasons for the distinction. Concerted anticompetitive action ordinarily poses a far greater danger to competition than anticompetitive unilateral action. Two firms undertaking anticompetitive conduct in tandem are more likely than a single firm to succeed in harming the workings of the market, two colluding firms can resort to tactics that neither could successfully execute alone, and two firms working together can artificially expand their market power beyond what either would command on its own. VI Areeda & Hovenkamp ¶ 1402 at 8-11. In contrast, it is much rarer that anticompetitive unilateral action actually has significant anticompetitive effects. *Id.* at 8.

At the same time, the risks of over-deterrence are much greater for unilateral action than for concerted action. Antitrust restrictions on unilateral conduct short of monopolization chill aggressive competitive conduct of the type the Sherman Act aims to encourage. Antitrust restrictions on concerted actions are much less likely to deter procompetitive conduct. In light of these respective risks of over- and under-deterrence, the Sherman Act strikes a balance, condemning concerted conduct that actually has anticompetitive effects, while condemning unilateral action only if it threatens mo-

nopoly. It has therefore long been recognized that, absent a threat of monopolization, a firm has the right under the antitrust laws to conduct its business as it wishes. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984); *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

The existence of an agreement is thus a core element of a § 1 claim. Because of the competitive importance of determining this issue correctly, the range of inferences that may be drawn from ambiguous evidence of agreement in a § 1 case is limited. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). "This higher threshold is imposed . . . to avoid deterring innocent conduct that reflects enhanced, rather than restrained, competition." *In re Flat Glass Litigation*, 385 F.3d 350, 357 (3d Cir. 2004).

The language of the Sherman Act, together with an appreciation of the need to preserve the competitive maneuverability of firms acting unilaterally, have persuaded some circuits to apply a "plus-factors" standard for evaluating antitrust conspiracy claims at the pleading stage of the case, if there are no allegations of direct evidence of conspiracy. *See, e.g., In re Flat Glass Litigation*, 358 F.3d at 360.

Under the plus-factors standard, an antitrust claim does not survive a motion to dismiss unless it alleges, in addition to parallel conduct and "a conspiracy," either direct evidence of conspiracy or other specific facts tending to show that the defendants illegally colluded. At the pleading stage, the plaintiff is not required to describe every aspect of the asserted conspiracy in detail. It must, however, offer some basis for its claims before it can invoke a discovery process that may either strip the defendant of millions of dollars or pressure it into a nuisance settlement. *See Dura Pharmaceuticals, Inc. v. Broudo*, 125 S. Ct. 1627, 1634 (2005).

To qualify as a plus factor, an allegation must be specific and it must "tend to exclude the possibility" of independent

action, *Matsushita*, 475 U.S. at 588, or "tend[] to establish collusion." *Williamson Oil Co., Inc. v. Philip Morris USA*, 346 F.3d 1287, 1303 (11th Cir. 2003). There is no fixed list of all possible factors, but under the plus-factors analysis there is a requirement that the allegation be one that, if later proved, "tends to exclude" the possibility of independent action or "tends to establish" a conspiracy. *Williamson Oil*, 346 F.3d at 1303.

By rejecting a plus-factors standard at the motion to dismiss stage even where there is no allegation of direct evidence of conspiracy, the decision below improperly shifts the Sherman Act's balance in a way that punishes non-monopolistic single-firm conduct and deters vigorous, competitive behavior.

IV. THE DECISION BELOW INCORRECTLY APPLIES THE FEDERAL PLEADING RULES

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that a complaint include "a short and plain statement of the claim showing that the pleader is entitled to relief." A complaint that alleges only parallel conduct and the conclusory label "conspiracy" does not provide the defendant with adequate notice of the claim against it nor show that the pleader is entitled to relief. *See Swierkiewicz v. Sorema*, 534 U.S. 506, 512 (2002).

As discussed above, bare allegations of parallel conduct, under *Matsushita*, do not state a claim for relief under Section 1 of the Sherman Act. And adding the word "conspiracy" does nothing because the word "conspiracy," standing alone, is a only a legal label. As the First Circuit has written, "[c]onclusory allegations in a complaint, if they stand alone, are a danger sign that the plaintiff is engaged in a fishing expedition." *DM Research, Inc. v. College of American Pathologists*, 170 F.3d 53, 55 (1999).

The decision below ignores Rule 8(a)'s requirement that the complaint show "that the pleader is entitled to relief." Proof of parallel conduct does not entitle a litigant to relief, and therefore, under an accurate reading of Rule 8(a), a claim of parallel conduct does not state a claim upon which relief may be granted. The bald assertion of "conspiracy" does not save the complaint because it is conclusory only, untethered either to allegations of plus factors or of direct evidence of conspiracy.

A court may not fill in the blanks that the plaintiff has left in its complaint. With a conspiracy claim as with any other claim, it is not appropriate for the court to assume that a plaintiff will prove facts it has not asserted or that "the defendants have violated the antitrust laws in ways that have not been alleged." *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519, 527 (1983). Rather, the allegations in a complaint must be sufficiently specific to "justify dragging a defendant past the pleading stage." *DM Research*, 170 F.3d at 55 (internal citations omitted). "[T]erms like 'conspiracy' . . . are border-line: they might well be sufficient in conjunction with a more specific allegation . . . but a court is not required to accept such terms as a sufficient basis for a complaint." *Id.*

The decision below also fails to give force to Rule 12(b)(6). Even twenty years ago, before the advent of electronic files and the explosion in discovery costs, the Seventh Circuit concluded that:

> When the requisite elements [of an antitrust violation] are lacking, the costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint. A contrary view would be tantamount to provid-

ing antitrust litigation with an exemption from Rule 12(b)(6).

Car Carriers, Inc. v. Ford Motor Corp., 745 F.2d 1101, 1106-07 (7th Cir. 1984). Where, as here, the plaintiffs rely on parallel conduct as the sole factual basis for the allegation of conspiracy, the facts alleged, if proven, would not support a finding of conspiracy. A standard that allows such a bare complaint to survive a motion to dismiss guts Rules 8 and 12, and should be reversed.

CONCLUSION

The decision below addressed a claim brought in a highly regulated industry, but its adverse effects will be felt more broadly in commodity businesses as well. It threatens to interfere with efficient business operations and prolong frivolous antitrust litigation for businesses of many kinds across the nation.

The petition for a writ of *certiorari* should be granted and the decision of the Second Circuit reversed.

Respectfully submitted,

MARK FUCHS
GENERAL COUNSEL
LOUISIANA-PACIFIC CORP.
414 Union St.
Suite 2000
Nashville, Tennessee 37219
(615) 986-5600

PAUL H. FRIEDMAN
Counsel of Record
REBECCA P. DICK
DECHERT LLP
1775 Eye St., N.W.
Washington, DC 20006
(202) 261-3300

Counsel for Amicus

(5)

Supreme Court, U.S.
FILED
APR 3 - 2006
OFFICE OF THE CLERK

No. 05-1126

In the Supreme Court of the United States

BELL ATLANTIC CORPORATION, ET AL.,
Petitioners

v.

WILLIAM TWOMBLY, ET AL.,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF MASTERCARD INTERNATIONAL INC. AND VISA U.S.A. INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

TIMOTHY J. MURIS
(Counsel of Record)
REBECCA H. FARRINGTON
TOBY HEYTENS
ADAM J. COATES
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

REASONS FOR GRANTING THE WRIT 2

I. Meaningful implementation of the Rule 8(a) pleading standard is especially important in antitrust cases 3

II. Lower courts and plaintiffs' lawyers have already seized on *Twombly* to justify loosening existing pleading standards in a wide variety of contexts 8

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

In re Alstom SA Securities Litigation,
406 F. Supp. 2d 433 (S.D.N.Y. 2005) 9

Arnold-Chevrolet LLC v. Tribune Co.,
No. 04-CV-3097 (DRH) (WDW),
2006 WL 497202 (E.D.N.Y. Mar. 2, 2006) 8

Balaklaw v. Lovell,
14 F.3d 793 (2d Cir. 1994) 9

Daniel v. American Board of Emergency Medicine,
428 F.3d 408 (2d Cir. 2005) 10

FTC v. Lukens Steel Co.,
444 F. Supp. 803 (D.D.C. 1977) 4

In re Global Crossing, Ltd. Securities Litigation,
No. 02 Civ. 910 (GEL),
2005 WL 2990646 (S.D.N.Y. Nov. 7, 2005) 9

In re Hydrogen Peroxide Antitrust Litigation,
401 F. Supp. 2d 451 (E.D. Pa. 2005) 8

Kendall v. Visa U.S.A., Inc.,
No. C 04-04276JSW, 2005 WL 2216941
(N.D. Cal. July 25, 2005) 2

Lee v. Healthfirst, Inc.,
No. 04 Civ. 8787 (THK),
2006 WL 177175 (S.D.N.Y. Jan. 25, 2006) 9

Matsushita Electric Industrial Co. v. Zenith Radio Corp.,
475 U.S. 574 (1986) 6

Michael Aram, Inc. v. Laurey,
No. 05 Civ. 8380 (CSH),
2006 WL 510527 (S.D.N.Y. Mar. 1, 2006) 9

Monsanto Co. v. Spray-Rite Service Corp.,
465 U.S. 752 (1984) 6

National Bancard Corp. v. VISA U.S.A., Inc.,
779 F.2d 592 (11th Cir. 1986) 1

Nokia Corp. v. Uzan,
425 F.3d 1005 (2d Cir. 2005) 10

Reyn's Pasta Bella, LLC v. Visa U.S.A., Inc.,
259 F. Supp. 2d 992 (N.D. Cal. 2003) 1-2

Texaco, Inc. v. Dagher,
126 S. Ct. 1276, (2006) 1

United States v. Broadcast Music, Inc.,
426 F.3d 91 (2d Cir. 2005) 10

United States v. Valdez,
426 F.3d 178 (2d Cir. 2005) 10

United States v. Martin,
426 F.3d 83 (2d Cir. 2005) 10

United States v. Santos,
425 F.3d 86 (2d Cir. 2005) 10

In re Urethane Antitrust Litigation,
409 F. Supp. 2d 1275 (D. Kan. 2006) 8

Waterman v. Register.com,
No. 05 CIV 2191 (GEL),
2005 WL 2759825 (S.D.N.Y. Oct. 19, 2005) 9

Zmijewska v. Gonzales,
426 F.3d 99 (2d Cir. 2005) 10

OTHER AUTHORITIES

Edward D. Cavanagh, *Pleading Rules in Antitrust Cases: A Return to Fact Pleading?*, 21 Rev. Litig. 1 (2002) 7

Edward D. Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 Tul. L. Rev. 777 (1987) 6

Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. Rev. 635 (1989) 5

In re Polygram Holding, Inc., No. 9298, 5 Trade Reg. Rep. (CCH) ¶ 15,453 (F.T.C. July 24, 2003) 1

Report from the Advisory Committee on Federal Rules of Civil Procedure to the Standing Committee on Rules of Practice and Procedure (Dec. 15, 2005) 4

James L. Smith, *Distinguishable Patterns of Competition, Collusion, and Parallel Action* (May 5, 2003) 3

William H. Wagener, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. Rev. 1887 (2003) 5

INTEREST OF *AMICI CURIAE*[1]

MasterCard International Inc. ("MasterCard") and Visa U.S.A. Inc. ("Visa") are joint ventures established and operated by various financial institutions to develop and promote globally recognized payment cards. Neither MasterCard nor Visa actually issues payment cards to consumers; various member banks issue cards. Instead, MasterCard and Visa provide certain services that would be difficult for their individual members to perform on their own, including: (1) the promotion and marketing of a universally recognized mark; and (2) a system to facilitate the approval and processing of charges involving millions of merchants and card-holders and thousands of banks every day. The result has been expanded output, declining prices, and technological innovation—all indicators of significant and increasing competition.

In MasterCard's and Visa's view, "[n]o analytical exercise is more important to U.S. competition policy than defining the bounds of acceptable cooperation between direct rivals." *In re Polygram Holding, Inc.*, No. 9298, 5 Trade Reg. Rep. (CCH) ¶ 15,453 (F.T.C. July 24, 2003) (Opinion of Chairman Timothy J. Muris). Because they are joint ventures of banks across the country, MasterCard and Visa are sometimes subjected to allegations of conspiracy based simply on their structure. Of course, the formation of *bona fide* joint ventures among competitors is entirely lawful. *See, e.g., Texaco, Inc. v. Dagher*, 126 S. Ct. 1276, 1279-80 (2006). But that has not stopped plaintiffs' lawyers from alleging that the payment card industry's very nature is somehow suspect under the federal antitrust laws. *See, e.g., Nat'l Bancard Corp. v. Visa U.S.A. Inc.*, 779 F.2d 592, 596 (11th Cir.), *cert. denied*, 479 U.S. 923 (1986); *Reyn's Pasta Bella,*

---

[1] Letters of consent to the filing of this brief have been lodged with the Clerk. No counsel for a party authored this brief in whole or part, and no person or entity other than *amici* and their counsel made a monetary contribution to its preparation or submission.

LLC v. Visa U.S.A. Inc., 259 F. Supp. 2d 992, 1004 (N.D. Cal. 2003), *aff'd*, -- F.3d --, 2006 WL 760175 (9th Cir. Mar. 27, 2006); *Kendall v. Visa U.S.A. Inc.*, No. C 04-04276JSW, 2005 WL 2216941, at *1 (N.D. Cal. July 25, 2005).

In addition, as two of the four major "brands" of payment cards in the United States (the others are American Express and Discover), MasterCard and Visa have a special interest in ensuring that business entities are not subjected to burdensome litigation based on nothing more than a lawyer's ability to assert that vigorous competitors have at times acted in ways that can be characterized as "parallel." In fact, the history of the various payment card networks illustrates that parallelism is often a sound, pro-consumer business strategy.

Perhaps the most obvious example of parallelism involves the physical cards themselves. All payment cards are the same general size and shape, which makes it possible both for the cards to be carried in a purse or wallet along with a driver's license and other identification and allows the same machines to read the different networks' cards. Payment card companies have also engaged in parallelism involving technology. For example, payment card companies have made rational and independent—yet parallel—business decisions with regard to the feasibility of implementing particular technological innovations. Although each of these examples of parallelism was entirely lawful, it is precisely these sorts of sensible business decisions that will surely be subjected to increased scrutiny and litigation absent this Court's prompt intervention.

REASONS FOR GRANTING THE WRIT

Petitioners have cogently explained how the Second Circuit's decision conflicts with both the decisions of this Court and those of its sister Circuits, Pet. for Cert. 11-21, why it "invites frivolous litigation," *id.* at 26-29, and why prompt review by this Court is both necessary and appropriate, *id.* at

28-29. *Amici* will not repeat that analysis here. Instead, we will focus on two practical ramifications of the Second Circuit's decision, each of which independently warrants certiorari. *First*, ensuring that Rule 8(a)'s admittedly modest pleading requirements are not drained of all rigor is especially important for antitrust cases brought in the name of consumers, in which the nature of the disputes, the massive and asymmetrical discovery costs, and the threat of crippling remedies often combine to pressure defendants to settle cases that survive a motion to dismiss, even when the plaintiff's claims are marginal at best. Accordingly, it is critically important in such cases that the pleading stage afford antitrust defendants a meaningful opportunity to end a meritless suit before the risk calculus shifts and discovery commences. *Second*, as a mere six months' experience already shows, *Twombly* is a highly significant decision whose effects are already being felt far beyond the telecommunications industry or even antitrust cases.

I. Meaningful implementation of the Rule 8(a) pleading standard is especially important in antitrust cases.

As courts and commentators have long recognized, far from proving anticompetitive collusion, consciously parallel business conduct is often a hallmark of an efficient market.[2] Firms operating in the same industry confront similar cost and incentive structures, and it is hardly surprising that sophisticated businesses pay close attention to their rivals, both

---

[2] *See, e.g.*, James L. Smith, *Distinguishable Patterns of Competition, Collusion, and Parallel Action* 23 (May 5, 2003), *available at* http://web.mit.edu/ceepr/www/2003-006.pdf (last visited April 5, 2006) ("[T]he degree of parallel action among producers varies predictably with the degree of interdependence among firms . . . . [M]easures of parallel action are expected to vary inversely with the degree of interdependence: more parallelism among perfectly competitive firms, less among interdependent oligopolists, and even less among collusive members of a frictionless cartel.").

to ensure that they have not overlooked a revenue-increasing or cost-saving opportunity and to avoid being placed at a competitive disadvantage with respect to their mutual customers. Accordingly, legal rules that subject businesses to substantial costs simply because they have engaged in conduct that can be characterized as "parallel" risk deterring a great deal of pro-competitive behavior, generating net social losses that consumers will ultimately bear.

The pleading standard announced in *Twombly* is just such a rule. Because plaintiffs' lawyers will surely seize (and have already seized) upon it to argue that antitrust conspiracy claims can survive initial review based on factual allegations that demonstrate nothing more than parallel conduct, *Twombly* will harm competition for at least three important reasons.

The first relates to the nature of antitrust discovery. As this Court no doubt knows, civil discovery tends to be costly and time-consuming.[3] But this general reality is especially true for antitrust actions, where the inevitably fact-intensive and complex nature of the claims coalesce to make discovery particularly onerous, lengthy, and expensive.[4] As a result, antitrust cases tend to last substantially longer (and thus consume substantially more resources) than other types of civil litigation.[5] These basic realities give any rational business a

---

[3] *See, e.g.*, Report from the Advisory Comm. on Fed. R. Civ. P. to the Standing Comm. on R. of Prac. & P. 7-8 (Dec. 15, 2005), *available at* http://www.uscourts.gov/rules/Reports/CV12-2005.pdf (last visited April 5, 2006).

[4] *See, e.g.*, *FTC v. Lukens Steel Co.*, 444 F. Supp. 803, 805 (D.D.C. 1977) ("The discovery rules should normally be liberally construed . . . in antitrust cases.").

[5] Of the 599 antitrust cases of which the federal courts disposed in fiscal year 2000, the most recent year for which searchable data is readily available, the mean period from filing to final disposition was slightly more than 405 days. During the same year, the mean for all cases was approximately 312 days, about 23% or *three months shorter*. For cases

powerful incentive to avoid even factually meritless antitrust suits, even if that means forgoing certain competition-enhancing conduct in which the firm would otherwise engage.

Second, the fact that discovery costs in antitrust cases tend to be highly asymmetrical only exacerbates this general problem. Antitrust plaintiffs are generally much smaller than antitrust defendants, meaning that plaintiffs can demand both types and amounts of information that dwarf anything their adversaries could possibly seek in return. *See* Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. Rev. 635, 643 (1989) ("Large litigants have files—warehouses full of files. The adversary can demand that they be searched, at great cost; the adversary can notice the depositions of 20 corporate officers."); *see also* William H. Wagener, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. Rev. 1887, 1898 (2003) ("[T]he strategic plaintiff will evaluate her own exposure to costly discovery requests before drafting a broad discovery request."). In addition, because they have the power to choose when and on what precise theory to bring suit, antitrust plaintiffs can "structure [their] complaint to minimize the relevance of documents in [their] possession," which gives them a "tactical advantage in defining the parties' exposure to discovery costs." Wagener, *supra* at 1899. These general imbalances are even more pronounced when antitrust class actions are brought in the name of consumers, situations

---

terminated during fiscal year 1999, the comparable figures were slightly more than 497 and 406 days, respectively. (All data in this footnote was obtained from the searchable Federal District-Court Civil Cases database, available at http://teddy.law.cornell.edu:8090/questcv3.htm.) Significantly, this database does not distinguish between cases terminated at the pleading stage and those disposed of after discovery—for example, at the summary judgment stage. Therefore, it is likely that the lifespan of cases which survive past the pleading stage until summary judgment is significantly longer.

in which the plaintiffs' discovery costs will almost certainly be negligible, the defendants' will almost certainly be substantial, and the likelihood of bringing counterclaims is meager. The fact that antitrust discovery will almost always be far more expensive for defendants than plaintiffs, in turn, means that the former have far more powerful incentives to avoid it than the latter.

A final reason why permitting antitrust actions that are facially marginal to survive the pleading stage risks deterring pro-consumer conduct involves the prospect of what may happen if such a case ever reaches trial.[6] Because the upside of an antitrust plaintiff's victory is so huge—mandatory treble damages and fee-shifting—plaintiffs' attorneys have every incentive to press even marginal claims to the bitter end. *See, e.g.*, Edward D. Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 Tul. L. Rev. 777, 809 (1987) ("The lure of treble damages may encourage the filing of baseless suits which otherwise might not have been filed."). At the same time, because trials are so expensive and because even a small risk of potentially crippling liability is something that any sensible business will seek to

---

[6] *Twombly* does not purport to undermine the burden a Section 1 plaintiff must carry at the summary judgment stage. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (to survive summary judgment in the absence of direct evidence of conspiracy, a plaintiff must "present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently") (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)). That said, by threatening to extend the life of meritless cases, *Twombly* risks allowing many plaintiffs whose claims would otherwise be dismissed at the pleading stage a chance to survive the summary judgment hurdle as well, particularly given the fact that lower courts have sometimes allowed antitrust plaintiffs to reach trial based on little more than isolated, ambiguous, or confusing documents. Moreover, even when a defendant does prevail at the summary judgment stage, such a victory cannot restore the time and money wasted in defending against a strike suit. In short, although it is an important gatekeeper, summary judgment is no panacea for the problems created by *Twombly*.

avoid, it will often be rational for antitrust defendants to settle actions that they are confident would be proven meritless at a trial. *See, e.g.*, Edward D. Cavanagh, *Pleading Rules in Antitrust Cases: A Return to Fact Pleading?*, 21 Rev. Litig. 1, 11-13 (2002) ("Using straightforward cost-benefit analysis, many defendants faced with potentially huge outlays necessary to defend an action would choose to settle antitrust claims that they view as insubstantial and lacking in merit rather than to make the huge expenditures necessary to prevail at trial.").

The upshot of these facts and incentives is clear. Antitrust litigation is tremendously expensive, and it is generally far more so for defendants than for plaintiffs. Especially when combined with the widely asymmetrical risks the litigants will face if a case ever goes to trial, this basic reality encourages enterprising plaintiffs' attorneys to bring marginal claims without sufficient pre-filing factual investigation and makes it far easier for them to extract more and higher settlements from corporate defendants than the merits of their cases would otherwise warrant. A motion to dismiss for failure to state a claim should provide a defendant with a meaningful opportunity to end the proceeding before the risk calculus shifts and years of costly discovery commence. Accordingly, *Twombly*'s conclusion that Rule 8(a) erects only the thinnest of paper barriers against even facially frivolous claims threatens to induce firms to forgo efficient, procompetitive behavior to minimize the risk of such suits being filed in the first place, or to avoid the burdens of antitrust litigation by settling meritless claims for sums that will inevitably be paid by consumers.

II. Lower courts and plaintiffs' lawyers have already seized on *Twombly* to justify loosening existing pleading standards in a wide variety of contexts.

Although it is the context in which this particular case arose, the pernicious impacts of the Second Circuit's decision will not be confined to the telecommunications industry. Rather, courts in both the Second Circuit and elsewhere are already interpreting *Twombly* as an important general pronouncement about the Rule 8(a) pleading standard.

An examination of the subsequent cases that have referenced *Twombly* confirms its importance. Not surprisingly, *Twombly* has had an immediate and significant effect on district courts' understanding of the pleading standards for antitrust claims brought under Section 1 of the Sherman Act. In *Arnold Chevrolet LLC v. Tribune Co.*, a judge of the Eastern District of New York applied *Twombly*'s "realm of plausible possibilities" test to refuse to dismiss a complaint where "one possible *interpretation*" of the plaintiffs' allegations might lead to a finding of an unlawful conspiracy. No. 04-CV-3097 (DRH) (WDW), 2006 WL 497202, at *6 (E.D.N.Y. Mar. 2, 2006) (emphasis added). Courts outside the Second Circuit have also relied on *Twombly*'s description of the proper pleading standard to justify permitting antitrust conspiracy claims to survive motions to dismiss, and thus to compel defendants to submit to costly and time-consuming discovery. *See, e.g., In re Hydrogen Peroxide Antitrust Litig.*, 401 F. Supp. 2d 451, 460-61 (E.D. Pa. 2005); *In re Urethane Antitrust Litig.*, 409 F. Supp. 2d 1275, 1282, 1284 n.4 (D. Kan. 2006).

Nor has *Twombly*'s impact been limited to antitrust cases. For example, Judge Gerard E. Lynch, the district court judge whose careful opinion the Second Circuit reversed in *Twombly*, later applied the Second Circuit's formulation of the notice pleading standards to the securities fraud context in holding that the plaintiffs had adequately pled "control."

See In re Global Crossing, Ltd. Sec. Litig., No. 02 Civ. 910 (GEL), 2005 WL 2990646, at *8 (S.D.N.Y. Nov. 7, 2005). A different judge in the Southern District of New York later relied upon Judge Lynch's interpretation of the Second Circuit's *Twombly* decision to deny a motion to dismiss a securities fraud claim against two executives based on "control" allegations that were even more tenuous than those at issue in *Global Crossing*. *See In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 433, 503 (S.D.N.Y. 2005). In so holding, Judge Victor Marrero made clear that he would have dismissed the relevant claim pre-*Twombly* but that he had been persuaded that *Twombly* had altered the analysis. *See id.* District courts have also cited *Twombly* as justification for failing to dismiss actions for copyright infringement,[7] for employment discrimination,[8] and in other employment-related litigation.[9]

Plaintiffs' lawyers too have seized on *Twombly* to argue that their pleading burden is virtually nonexistent. Only weeks after the decision was handed down, plaintiffs in one antitrust case were arguing that *Twombly* "trumps" existing Second Circuit authority that had sensibly recognized that "'drawn-out proceedings necessary to evaluate [antitrust claims] could chill competitive forces.'"[10] According to that same filing, *Twombly* "expressly quoted and adopted" a "*special rule* for preserving antitrust cases for the discovery stage," and "explained that at the pleading stage even a po-

---

[7] *See Michael Aram, Inc. v. Laurey*, No. 05 Civ. 8380 (CSH), 2006 WL 510527, at *3 (S.D.N.Y. Mar. 1, 2006).

[8] *See Waterman v. Register.com*, No. 05 CIV 2191 (GEL), 2005 WL 2759825, at *2 (S.D.N.Y. Oct. 19, 2005).

[9] *See Lee v. Healthfirst, Inc.*, No. 04 Civ. 8787 (THK), 2006 WL 177175, at *5 (S.D.N.Y. Jan. 25, 2006).

[10] Pls.' Mem. in Opp. to Mot. to Dismiss by Defs. New York Univ. and Dr. Andrew Litt at 6, *New York Medscan LLC v. Carecore Nat'l LLC*, No. 05 Civ.4653 (DC) (S.D.N.Y. Nov. 18, 2005), 2005 WL 3654139 (quoting *Balaklaw v. Lovell*, 14 F.3d 793, 801 (2d Cir. 1994)).

tentially remote recovery is not subject to dismissal."[11] Numerous other plaintiffs have swiftly incorporated *Twombly* into their filings.[12]

A further, though not statistically rigorous, indication of *Twombly*'s immediate impact can be seen in the number of times courts have already cited the Second Circuit's opinion. During the week it decided *Twombly*, the Second Circuit issued eight published opinions.[13] *Twombly* is the most cited of these opinions by far, having been referenced by courts more than twice as often as the next most frequently cited opinion and five times more often than any of the others.[14]

In short, *Twombly* is far from simply yet another decision that applies existing Rule 8 pleading standards. Rather, it is an important ruling whose evisceration of well-established pleading requirements has already started to expand far beyond its original context and seems certain to continue doing

---

[11] *See id.* at 5 (emphasis added).

[12] *See, e.g.*, Mem. of Law in Opp. to Xerox Defs.' Partial Mot. to Dismiss the Am. Compl. at 26, *Carlson v. Xerox Corp.*, No. 3:00-CV-1621 (D. Conn. Jan. 31, 2006), 2006 WL 372098; Class Pls.' Mem. in Opp. to Defs.' Joint Mot. to Dismiss Claims Alleged to be Outside the Statute of Limitations in Class Pls.' Second Am. Consol. Class Action Compl., *In re Publ'n Paper Antitrust Litig* at 3-4, No. 3:04 md 1631 (SRU) (D. Conn. Nov. 30, 2005), 2005 WL 3726244. A Westlaw Keycite search performed on April 4, 2006 revealed 59 trial-court filings referencing *Twombly*. Because that database includes only a small fraction of all filings, the true number is certainly far larger.

[13] In addition to *Twombly*, the cases are *United States v. Martin*, 426 F.3d 83 (2d Cir. 2005); *United States v. Santos*, 425 F.3d 86 (2d Cir. 2005); *Nokia Corp. v. Uzan*, 425 F.3d 1005 (2d Cir. 2005); *United States v. Valdez*, 426 F.3d 178 (2d Cir. 2005); *United States v. Broadcast Music, Inc.*, 426 F.3d 91 (2d Cir. 2005); *Zmijewska v. Gonzales*, 426 F.3d 99 (2d Cir. 2005); and *Daniel v. American Board of Emergency Medicine*, 428 F.3d 408 (2d Cir. 2005).

[14] All citation data in this paragraph was obtained through a Westlaw Keycite search conducted on April 4, 2006.

so unless it is promptly disavowed. Because the Second Circuit has refused to do so, *see* Pet. for Cert. App. 59a, this Court's intervention is necessary.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

TIMOTHY J. MURIS
(Counsel of Record)
REBECCA H. FARRINGTON
TOBY HEYTENS
ADAM J. COATES
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

April 6, 2006

(2)

No. 05-1126

Supreme Court, U.S.
FILED
APR 5 - 2006
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BELL ATLANTIC CORPORATION, *ET AL.*,

Petitioners,

—v.—

WILLIAM TWOMBLY, *ET AL.*, individually and on behalf of all others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

MARK S. POPOFSKY
KAYE SCHOLER LLP
901 15th Street, N.W.
Washington, D.C. 20005
(202) 682-3500

SAUL P. MORGENSTERN
Counsel of Record
ROBERT GRASS
SHEFALI M. KOTHARI
KAYE SCHOLER LLP
425 Park Avenue
New York, New York 10022
(212) 836-8000

Counsel for Amicus Curiae
Pharmaceutical Research and Manufacturers of America

April 6, 2006

TABLE OF CONTENTS

PAGE

INTEREST OF *AMICUS CURIAE* 1

REASONS FOR GRANTING THE PETITION 6

I. THE SECOND CIRCUIT'S RELAXED PLEADING STANDARD FOR SECTION 1 CONSPIRACY ALLEGATIONS FLOUTS RULE 8 AND THIS COURT'S PRECEDENTS 6

II. THE SECOND CIRCUIT'S FLAWED PLEADING STANDARD THREATENS TO DETER AND PENALIZE PRO-COMPETITIVE CONDUCT 10

A. The Pharmaceutical Industry is Particularly Vulnerable to the "Litigation Tax" that the Second Circuit's Reduced Pleading Standard Imposes 10

B. The Second Circuit's Flawed Pleading Standard Undesirably Encourages Meritless Suits by Promoting Forum Shopping and Circumventing the Limitations Congress Placed on Initiating Antitrust Investigations..... 15

CONCLUSION 18

TABLE OF AUTHORITIES

Cases: PAGE

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 7

Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters,
459 U.S. 519 (1983) 7, 8, 9

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993) 6

Conley v. Gibson, 355 U.S. 41 (1957)..... 7, 8

Doe v. Hyland Therapeutics Div.,
807 F. Supp. 1117 (S.D.N.Y. 1992)..... 15

Dura Pharmaceuticals, Inc. v. Broudo,
125 S. Ct. 1627 (2005)..... 9, 11

Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986)..... o, 10

Monsanto Co. v. Spray-Rite Serv. Corp.,
465 U.S. 752 (1984) 6, 10

Swierkiewicz v. Sorema N. A.,
534 U.S. 506 (2002) 9

Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537 (1954)..... 6

Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP,
540 U.S. 398 (2004) 12

PAGE

Federal Statutes and Rules:

15 U.S.C. § 57b-1 15

15 U.S.C. § 57b-1(f) 16

15 U.S.C. § 1312 16

15 U.S.C. §1312(a) 16

15 U.S.C. § 1314(b) 16

21 U.S.C. § 321(m) 13

21 U.S.C. § 351 13

21 U.S.C. § 355 13

21 U.S.C. § 355(b)(1)(F) 13

21 U.S.C. § 355(e) 13

21 U.S.C. § 375(b) 13

42 U.S.C. §§ 1396r-8(b), (c) 14

21 C.F.R. § 200.5 13

21 C.F.R. § 201 13

21 C.F.R. § 202.1(j) 13

21 C.F.R. § 203 13

21 C.F.R. § 211 13

21 C.F.R. § 312 13

21 C.F.R. § 314 13

21 C.F.R. § 314.50 13

37 C.F.R. §§ 1.31, *et seq.* 13

PAGE

Fed. R. Civ. P. 8(a)(2) 7

Fed. R. Civ. P. 56..... 7

State Statutes:

Fla. Stat. Ann. § 542.28 16

Md. Comm. Law Code § 11-205 16

N.J. Stat. Ann. § 56:9-9..... 16

N.M. Stat. Ann. § 57-1-5 16

Tex. Bus. & Com. Code § 15.10..... 16

Miscellaneous:

6 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW (2d ed. 2002) 6, 10

2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW (2d ed. 2002) 8

Mark S. Popofsky, *Defining Exclusionary Conduct: Section 2, the Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*, 73 ANTITRUST L.J. __ (forthcoming Apr. 2006)..... 12

BRIEF OF PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Pharmaceutical Research and Manufacturers of America ("PhRMA") submits this brief as *amicus curiae* in support of petitioners.[1] All parties have consented to the filing of this *amicus curiae* brief pursuant to letters filed with the Clerk of the Court.

INTEREST OF *AMICUS CURIAE*

PhRMA is a voluntary, nonprofit association that represents the country's leading research-based pharmaceutical and biotechnology companies.[2] PhRMA's members invent and market medicines that enable patients to lead longer, healthier and more productive lives. One of PhRMA's central functions is to represent the interests of its members before the courts, Congress and the Executive Branch. In that capacity, PhRMA regularly files *amicus curiae* briefs in cases that raise issues of vital concern to its members.

PhRMA submits this brief to urge this Court to grant the petition for a writ of certiorari because the pleading standard for antitrust conspiracies adopted by the Second Circuit in this case threatens to chill legitimate business conduct, and impose costs on PhRMA's members, which

---

[1] Pursuant to Rule 37.6 of the Rules of this Court, PhRMA states that this brief was not written in whole or in part by counsel for a party, and that no one other than the *amicus curiae*, its members, or its counsel has made any monetary contributions to the preparation or submission of this brief.

[2] A current list of PhRMA's members is set forth on PhRMA's website, and can be found at http://www.phrma.org/about_phrma/member_company_list/members.

will harm American consumers and disserve the antitrust laws' substantive goals. The Second Circuit held that a court may not dismiss a claim under Section 1 of the Sherman Act even when the pleaded facts, and all natural or reasonable inferences drawn from those pleaded facts, would fail to evidence a Sherman Act conspiracy at summary judgment. Pet. App. 2a-34a. In so holding, the Second Circuit flouted Federal Rule of Civil Procedure 8 by creating a relaxed standard under which antitrust plaintiffs are not required to plead facts that, if proved, would entitle them to relief.

Applying that relaxed standard to this case, the Second Circuit held that allegations that petitioners engaged in parallel conduct, without more, suffice to allege a conspiracy under Section 1 of the Sherman Act even though such allegations, if proven, would fail to satisfy the applicable substantive legal standard governing Sherman Act conspiracy claims. Pet. App. 24a-25a. Essentially requiring petitioners, on a motion to dismiss, to prove a negative and address facts not pled in the complaint, the Second Circuit held that "a court would have to conclude that there is no set of [unpleaded] facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence." Pet. App. 25a. Or, as the court put it elsewhere, to sustain the conspiracy allegation, it need only conclude that "the pleaded factual predicate" included a "conspiracy among the realm of 'plausible' possibilities." Pet. App. 25a. Because a plaintiff can virtually always conjure up *un*pleaded facts (that is, facts that need not comply with the requirements of Federal Rule of Civil Procedure 11, or else they surely would have *been* pled) hypothesizing a "conspiracy among the realm of 'plausible' possibilities," *any* complaint challenging parallel conduct will survive a motion to dismiss in the Second Circuit. Pet. App. 28a.

The Second Circuit's pleading standard will encourage plaintiffs to initiate costly litigation that challenges nothing more than lawful and efficient conduct. As the Second Circuit itself recognized, evidence that companies engage in parallel conduct, without more, is insufficient to prove a Sherman Act conspiracy because parallel behavior may " 'simply be the result of similar decisions by competitors who have the same information and the same basic economic interests.' " Pet. App. 24a. Rather than a telltale sign of conspiracy, parallel conduct often reflects competition at work. This is particularly true of the pharmaceutical industry. PhRMA's members, many of which are based or operate in the Second Circuit, compete in an intellectual property-driven industry characterized by (i) pervasive federal regulation that applies uniformly to all members, (ii) gatekeepers (doctors and formulary designers) who determine whether and how prescription pharmaceutical products will be used, and (iii) increasingly sophisticated third-party payors who impose similar requirements on all competitors who wish to provide prescription pharmaceuticals to their beneficiary populations. Not surprisingly, as do participants in many other competitive markets, pharmaceutical companies often react similarly to the same regulatory and market forces.

For example, each PhRMA member provides the same type of information in the same format on the labeling accompanying its prescription medicines in light of regulations governing the content and format of such labeling. In addition, because many PhRMA members compete to convince the same doctors to write prescriptions for their medicines and because communications between PhRMA members and doctors also is subject to regulation, it is not surprising that PhRMA members often provide similar information in similar ways to doctors, even aside from the labeling itself.

Similarly, because the distribution of prescription pharmaceuticals is highly regulated, it is not surprising that many PhRMA members adopt similar practices and strategies to ensure that they sell through distribution networks that fully comply with U.S. Food and Drug Administration ("FDA") regulations, and ensure the pedigree and integrity of the products on pharmacists' shelves. Thus, faced with identical regulation and similar information about the distribution chain, many PhRMA members may make similar choices regarding whom to sell through, what terms and conditions to impose with respect to purchase volumes and returns to assure both availability and freshness, and other elements of the distribution relationship. Nor would it be surprising to find in any instance that several PhRMA members have adopted similar strategies to ensure that patients who are members of third-party payor plans (*e.g.*, health insurance plans, health maintenance organizations and other forms of managed care) have access to their medicines, in light of the fact that many such third-party payors rely on similar—and well known—strategies and tools in bargaining with PhRMA members over such things as formulary access.

Finally, all PhRMA members are cognizant of the same need to make their lifesaving products available to segments of the population who need them but cannot afford them, and it is not surprising that many have adopted similar strategies (sometimes through joint projects and sometimes acting individually) to make their products available to such populations for free or at greatly reduced prices. Because PhRMA members are generally not in the business of dealing directly with patients, they often must rely on, and negotiate with others—retail pharmacies, clinics, and other providers—to execute such programs. The search for efficient solutions

to similar problems, addressed through similar channels, will often yield similar approaches.

If left standing, the Second Circuit's newly-minted antitrust pleading standard threatens to subject PhRMA members to antitrust claims based on nothing more than allegations of such competitive, yet parallel, conduct that the antitrust laws do not prohibit. The ultimate dismissal of such baseless fishing expeditions on summary judgment, while likely, would provide cold comfort to defendants who will have been burdened with "the sometimes colossal expense of undergoing discovery, that . . . likely lead[s] defendants to pay plaintiffs to settle what would ultimately be shown to be meritless claims," which "encourages others to be brought." Pet. App. 30a. As the court of appeals itself recognized, the "overall result" of its dilution of Rule 8 "may well be a burden on the courts and a deleterious effect on the manner in which and efficiency with which business is conducted." Pet. App. 30a. Deterring PhRMA members from seeking the most efficient methods to address the regulatory and business realities they all confront could compromise the effectiveness of an indispensable American industry.

This Court should grant the petition for a writ of certiorari to make clear that, rather than compel this perverse result, the Federal Rules of Civil Procedure require an antitrust plaintiff to do what any plaintiff must do: Set forth in its complaint facts which, if taken as true and all inferences naturally arising from them drawn, substantively support each element of the claim asserted.

REASONS FOR GRANTING THE PETITION

I. THE SECOND CIRCUIT'S RELAXED PLEADING STANDARD FOR SECTION 1 CONSPIRACY ALLEGATIONS FLOUTS RULE 8 AND THIS COURT'S PRECEDENTS

This "Court has never held that proof of parallel business behavior conclusively establishes agreement, or phrased differently, that such behavior itself constitutes a Sherman Act offense." *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954). Indeed, even "conscious parallelism" is "not in itself unlawful." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993). To protect lawful, parallel behavior from the chilling effect of costly mistaken inferences of conspiracy, this Court has held that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). Rather, to infer a conspiracy under Section 1 of the Sherman Act, a plaintiff must prove facts " 'that tend[ ] to exclude the possibility' that the alleged conspirators acted independently." *Id.* (citation omitted). Thus, "[w]ith rare exceptions, the courts have been very clear that mere parallelism, including interdependent conscious parallelism, cannot support a conspiracy finding unless there are additional or 'plus' factors." 6 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1434(a), at 241 (2d ed. 2002). As this Court has explained, a contrary rule would "deter procompetitive conduct." *Matsushita*, 475 U.S. at 593; *see Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 763 (1984) (permitting an inference of conspiracy from conduct that is as consistent with legit-

imate competition as with conspiracy "could deter or penalize perfectly legitimate conduct").

The court of appeals erroneously held that the foregoing substantive legal test for conspiracy applies only at the summary judgment stage, and not at the pleading stage. Pet. App. 24a-28a. The substantive legal standard under Sherman Act Section 1 is the same at the pleading stage and at summary judgment. The only difference is that, at the pleading stage, the pled facts must be taken as true, while at summary judgment, triable evidence supporting those facts must be adduced. Thus, at the pleading stage, the facts pled must state a claim under the applicable substantive legal standard, *see* Fed. R. Civ. P. 8(a)(2); and at summary judgment, the plaintiff must adduce triable evidence of materials facts that meet that same substantive legal test. *See* Fed. R. Civ. P. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986) ("Thus, in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden."). There is no reason why a complaint should survive a motion to dismiss when triable evidence of the facts pleaded would be insufficient to defeat a motion for summary judgment.

To be sure, a complaint should be dismissed only where it is "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). That maxim of notice pleading does not, however, authorize a court "to assume that the [plaintiff] can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged." *Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 526 (1983). The combined effect of these principles, the

district court in this case recognized, is that a conclusory allegation of a required legal element (here, conspiracy) that depends on the existence of unpleaded facts cannot alone meet the applicable substantive legal test. Rather, "[t]he crucial inquiry" is "what inferences naturally arise from the facts that plaintiffs have pled, taking all the facts in the Amended Complaint as true." Pet. App. 46a. To hold otherwise would effectively relieve a plaintiff of the obligation to plead facts that, if true, actually establish the substantive elements of its claim, in contravention of Rule 8's underlying principle of providing fair notice and commandment that "all pleadings shall be so construed to do substantial justice." *Conley*, 355 U.S. at 48.

This Court's decisions reflect this proper pleading standard at work. In *Associated General Contractors*, this Court held that the district court properly dismissed a Sherman Act claim when the plaintiff's allegations were "insufficient as a matter of law" to establish that the plaintiff was "a person injured by reason of a violation of the antitrust laws." *Associated Gen. Contractors*, 459 U.S. at 545-46.[3] The Court did not require defendants to show, as the Second Circuit did here, that there was "no set of [unpleaded] facts that would permit [the] plaintiff to demonstrate" antitrust injury. Pet App. 25a. Rather, the Court placed the burden of alleging facts establishing an essential element of its antitrust claim precisely where it belonged—on the party seeking to initiate litigation.

---

[3] As a leading treatise, citing *Associated General Contractors*, states, "a complaint may be dismissed when it fails to allege some fact that is essential to the cause of action. . . . [F]ailure to allege a fact essential to the claim is tantamount to an admission that that fact cannot or will not be established." 2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 307(c)(1), at 71 (2d ed. 2000).

This Court more recently reaffirmed the pleading principle underlying *Associated General Contractors* in *Dura Pharmaceuticals, Inc. v. Broudo*, 125 S. Ct. 1627 (2005), a securities case. Applying Federal Rule of Civil Procedure 8, the Court explained that plaintiffs' allegation that they " 'paid artificially inflated prices' " for the defendant issuer's securities was insufficient as a matter of law to establish proximate causation because that allegation, even if proven, "is not itself a relevant economic loss" and "the complaint nowhere provides the defendants with notice of what the relevant economic loss might be or what the causal connection might be between that loss and the [alleged] misrepresentation." *Id.* at 1634. Significantly, in *Dura*, the Court did not speculate as to whether plaintiffs might establish "relevant economic loss" or its "causal connection" to the alleged wrongful conduct based on *un*pleaded facts, even though the Court acknowledged that "an initially inflated purchase price *might* mean a later loss." *Id.* at 1632 (emphasis in original).[4]

Thus, on a motion to dismiss, a complaint ought to be dismissed when the pleaded facts, and inferences that naturally arise from them, fail to meet the applicable substantive legal test. The Second Circuit's decision materially and improperly alters that standard by requir-

---

[4] Similarly, in *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 514 (2002), the Court sustained a complaint when the plaintiff "alleged that he had been terminated on account of his national origin in violation of Title VII and on account of his age in violation of the ADEA" and his "complaint detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination." There the pleaded facts supported an inference that the plaintiff's termination was the result of his national origin. Here the pleaded facts, under settled antitrust law, cannot, without more, support an inference of conspiracy.

ing antitrust defendants at the pleading stage to refute the " 'plausible' possibilit[y]" of "facts" that plaintiffs themselves never asserted. Pet. App. 25a.

II. THE SECOND CIRCUIT'S FLAWED PLEADING STANDARD THREATENS TO DETER AND PENALIZE PRO-COMPETITIVE CONDUCT

A. The Pharmaceutical Industry is Particularly Vulnerable to the "Litigation Tax" that the Second Circuit's Reduced Pleading Standard Imposes

As this Court has recognized, absent the requirement of facts tending to exclude the possibility that alleged conspirators acted independently, antitrust conspiracy actions threaten to "deter or penalize perfectly legitimate conduct." *Monsanto*, 465 U.S. at 763; *see Matsushita*, 475 U.S. at 593.

There are compelling reasons to fear just such a chilling of legitimate conduct from the Second Circuit's flawed pleading test. "Mere parallelism . . . is widely present, especially in perfectly competitive markets, and is not itself a compelling subject for legal control." 6 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶1417(g), at 115 (2d ed. 2002). Indeed, "it is important to recognize that similar simultaneous actions may merely reflect independent responses to a common business problem." *Id.* ¶1425, at 172. But under the Second Circuit's test, essentially *any* allegation of parallel conduct—conduct that is often the hallmark of "perfectly competitive markets"—mandates denial of a motion to dismiss and entitles the plaintiff to conduct a fishing expedition for other facts necessary to establish a Section 1 conspiracy. In other words, a *mere* entirely unsubstantiated *suspicion* of conspiracy provides a portal for initiating the costly process of discovery.

As this Court has recognized, the costs of baseless litigation are severe. Permitting allegations that do not meet Rule 8 "would permit a plaintiff 'with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the [discovery] process will reveal relevant evidence.' " *Dura*, 125 S. Ct. at 1634 (citation omitted). Indeed, as the court of appeals conceded:

> We are mindful that a balance is being struck here, that on one side of that balance is the sometimes colossal expense of undergoing discovery, that such costs themselves likely lead defendants to pay plaintiffs to settle what would ultimately be shown to be meritless claims, that the success of such meritless claims encourages others to be brought, and that the overall result may well be a burden on the courts and a deleterious effect on the manner in which and efficiency with which business is conducted.

Pet. App. 30a.

Importantly, as the court of appeals highlighted, the prospect of incurring costs in baseless discovery and agreeing to "*in terrorem*" settlements of meritless claims will likely inhibit firms from engaging in precisely the lawful, pro-competitive parallel behavior that the substantive law of antitrust conspiracy is designed to protect. Firms planning efficient responses to market forces that mimic rivals' actions could be deterred from taking these actions because of the prospect that such business strategies will draw a baseless—but extremely expensive—antitrust suit. If such a suit, moreover, erroneously

escapes termination at summary judgment or trial, the costs may prove catastrophic.[5]

The pharmaceutical industry is particularly vulnerable to the "litigation tax" and chilling effect that the Second Circuit's diluted pleading standard threatens to impose on pro-competitive conduct. In competing to sell their products, pharmaceutical manufacturers face the same market factors that affect their dealings with prescribers, patients, wholesalers, retailers, insurers, and other third-party payors who cover some or all of the costs of filling prescriptions on behalf of patients. For example, third-party payors have increasingly adopted similar and well known strategies—such as controlling access to prescription drugs through the use of tiered formularies and financial incentives or penalties that encourage or discourage the prescribing of certain products by doctors in their networks—to demand rebates from manufacturers on prescriptions obtained by plan beneficiaries. In addition, pharmaceutical manufacturers generally must sell their products through the same group of wholesalers in order to assure that their products will reach pharmacies throughout the country. Each such wholesaler ordinarily can be expected to provide the same type of information about its business operations to manufacturers to facilitate efficient distribution. Moreover, all manufacturers have the same access to third-party sources of information about competitor pricing (*e.g.*, publishers of pharmaceutical product and pricing information such as First Databank, MediSpan and Redbook) and retail sales

---

[5] This Court has recognized the critical importance of taking into account the potential costs of "false positives" in designing antitrust legal tests. *See Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004); *see also* Mark S. Popofsky, *Defining Exclusionary Conduct: Section 2, the Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*, 73 ANTITRUST L.J. __ (forthcoming Apr. 2006).

information (*e.g.*, IMS data regarding retail prescription sales). Thus, all manufacturers will generally find themselves making commercial decisions based on substantially similar information about the markets into which their products will be sold.

In addition, pharmaceutical companies all face identical and pervasive federal regulation governing all aspects of their operations and the chain of distribution from manufacturing facility to pharmacy counter. Thus, federal regulations govern applications for the approval to market new medicines, including requirements for the studies and testing that are necessary to support such applications,[6] as well as whether and how patent protection may be obtained for them.[7] Federal regulations also govern the manufacturing, processing, packing and storage of pharmaceuticals, including regulations regarding qualifications and training of employees engaged in such activities; the buildings and facilities used for such activities; the equipment used during such activities; requirements for production, process, packaging, labeling and laboratory controls; and record-keeping requirements.[8] In addition, manufacturers' distribution choices are affected by federal regulations.[9] Even the companies' commercial speech is highly regulated, as the FDA regulates the form and content of pharmaceutical companies' communications with doctors and the general public.[10] Finally, the rebates paid to States by manufac-

---

[6] *See, e.g.*, 21 U.S.C. § 355 (2005); 21 C.F.R. §§ 312, 314 (2005).

[7] *See, e.g.*, 37 C.F.R. §§ 1.31, *et seq.* (2005).

[8] *See, e.g.*, 21 U.S.C. § 351 (2005); 21 C.F.R. § 211 (2005).

[9] *See, e.g.*, 21 C.F.R. § 203 (2005).

[10] *See, e.g.*, 21 U.S.C. §§ 321(m), 355(b)(1)(F), 355(e), 375(b) (2005); 21 C.F.R. §§ 200.5, 201, 202.1(j), 314.50 (2005).

turers with respect to prescriptions filled by certain patients who receive public assistance, such as those in the Medicaid program, are governed by federal regulation.[11] Such regulations apply to all innovator pharmaceutical companies in equal measure, and each must conform its conduct accordingly.

It is therefore hardly surprising—and not indicative of antitrust conspiracy—that pharmaceutical companies might react in similar fashion to the same market and regulatory realities. Moreover, the similar responses made by such companies to common business problems reflect efficient strategies for delivering benefits to consumers. The Second Circuit's new pleading standard for antitrust conspiracy cases, however, can be expected to deter the development and deployment of innovative business strategies that would have benefited consumers, or severely increase the costs of undertaking such efforts.

For example, as noted above, pharmaceutical manufacturing and distribution is highly regulated, and failure to meet government standards can have catastrophic consequences in terms of plant shutdowns, business interruption and loss of public confidence. If a number of companies relied on a supplier for certain ingredients (such as capsules), and the FDA identified a problem with one of the supplier's facilities, it would not be surprising if a number of companies suspended or terminated their dealings with that supplier in response—even though the problem was at only one location and the FDA did not order a shutdown—simply because they chose to be cautious. The Second Circuit's pleading standard, however, threatens to penalize pharmaceutical manufacturers that take actions they consider to be in the best long term interest of customers and shareholders.

---

[11] *See, e.g.*, 42 U.S.C. §§ 1396r-8(b), (c) (2005).

Essentially, they risk paying a potentially massive "litigation tax" simply because they chose independently to take similar actions.

B. The Second Circuit's Flawed Pleading Standard Undesirably Encourages Meritless Suits by Promoting Forum Shopping and Circumventing the Limitations Congress Placed on Initiating Antitrust Investigations

The Second Circuit's new pleading rule also promotes undesirable forum shopping and ignores statutory limitations on investigations of suspected antitrust violations—limitations intended to protect the rights of investigated parties.

As Petitioners explain (Pet. App. 19-21), the Second Circuit's relaxed pleading test conflicts with decisions in several other federal courts of appeals. One can therefore predict that antitrust plaintiffs seeking to bring *in terrorem* conspiracy suits based on nothing other than allegations of parallel conduct will flock to the Second Circuit, even when those suits are more properly brought elsewhere. The consequence will be to further clog the dockets of courts recognized to be among "the busiest districts in the country," *Doe v. Hyland Therapeutics Div.*, 807 F. Supp. 1117, 1128 (S.D.N.Y. 1992) (citation omitted), and to slow the resolution of legitimate disputes.

Finally, the Second Circuit's flawed pleading test effectively circumvents the careful limitations that Congress has placed on antitrust investigations. Congress vested the authority to investigate suspected antitrust violations not in private attorneys general, but rather in the Department of Justice and the Federal Trade Commission, *see* 15 U.S.C. §§ 57b-1, 1312 (2005) (conferring authority to issue civil investigative demands),

agencies authorized to represent the public interest, subject to important safeguards.[12] Yet the Second Circuit's pleading test permits private plaintiffs to launch a fishing expedition based on nothing more than a *mere suspicion* of illegality and without allegations of facts *necessary* to state a violation under the applicable substantive legal test for an antitrust conspiracy. Indeed, a plaintiff need not even have "reason to believe" (15 U.S.C. § 1312(a)) that a defendant's files will contain information that ultimately might substantiate its suspicion; rather, it must merely posit that the "conspiracy" it hypothesizes is "among the realm of 'plausible' possibilities." Pet. App. 25a.

The Second Circuit's pleading test, in other words, would transform private antitrust litigation from a method for resolving legitimate disputes into a virtually unrestrained private investigation tool. In the absence of a meaningful test imposed under Rules 8 and 12(b)(6), private plaintiffs, in effect, could issue civil investigative demands in the form of conclusory complaints and discovery requests any time parallel conduct is encountered without the important safeguards established by Congress that circumscribe government antitrust investigations. It is inconsistent with the investigative scheme Congress established to grant greater investigatory powers to private parties than are vested in the government agencies that are charged with protecting the public

---

[12] For example, the Justice Department can issue a civil investigative demand only by written authorization of the Attorney General or a designate and a party subject to such a demand can promptly challenge the basis for its issuance or seek modifications. *See* 15 U.S.C. §§ 1312, 1314(b), 57b-1(f) (2005). State statutes place similar important limitations on pre-complaint discovery by state antitrust investigators. *See, e.g.*, Fla. Stat. Ann. § 542.28 (2005); Md. Comm. Law Code § 11-205 (2006); N.J. Stat. Ann. § 56:9-9 (2006); N.M. Stat. Ann. § 57-1-5 (2006); Tex. Bus. & Com. Code § 15.10 (2005).

interest while respecting the rights of investigated parties. Reading Rule 8 to authorize private antitrust investigations whenever parallel conduct is found will frustrate the will of Congress and impose on firms further unreasonable and detrimental burdens that harm, rather than benefit, consumers.

* * *

The relaxed pleading standard for antitrust conspiracy actions adopted by the Second Circuit deters and penalizes lawful conduct and thereby subverts the purposes of the antitrust laws. That deleterious outcome is contrary to Rule 8 and should not be countenanced at the pleading stage any more than at summary judgment.

CONCLUSION

For the foregoing reasons and the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

SAUL P. MORGENSTERN
Counsel of Record
ROBERT GRASS
SHEFALI M. KOTHARI
KAYE SCHOLER LLP
425 Park Avenue
New York, New York 10022
(212) 836-8000

MARK S. POPOFSKY
KAYE SCHOLER LLP
901 15th Street, N.W.
Washington, D.C. 20005
(202) 682-3500

Counsel for Amicus Curiae Pharmaceutical Research and Manufacturers of America

Dated: April 6, 2006

Supreme Court, U.S.
FILED
APR 6 - 2006
OFFICE OF THE CLERK

(9)

No. 05-1126

IN THE

Supreme Court of the United States

BELL ATLANTIC CORPORATION, *et al.*,
Petitioners,

v.

WILLIAM TWOMBLY, *et al.*, individually
and on behalf of all others similarly situated,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Date: April 6, 2006

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether a complaint states a claim under Section 1 of the Sherman Act, 15 U.S.C. § 1, if it alleges that the defendants engaged in parallel conduct and adds a bald assertion that the defendants were participants in a "conspiracy," without any allegations that, if later proved true, would establish the existence of a conspiracy under the applicable legal standard.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTERESTS OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 6

I. THE DECISION BELOW PERMITS A COMPLAINT TO SURVIVE A MOTION TO DISMISS EVEN WHEN THE COMPLAINT FAILS TO CONTAIN SUFFICIENT FACTUAL ALLEGATIONS TO PROVIDE FAIR NOTICE OF THE GROUNDS FOR THE CLAIM 8

II. THERE IS WIDESPREAD UNWILLINGNESS AMONG THE LOWER FEDERAL COURTS TO GRANT MERITORIOUS RULE 12(b)(6) MOTIONS TO DISMISS, RESULTING IN WASTEFUL LITIGATION AND NUISANCE SETTLEMENTS 12

CONCLUSION 19

TABLE OF AUTHORITIES

Page

Cases:

Assoc. Gen'l Contractors of Calif. v. Calif. State Council of Carpenters, 459 U.S. 519 (1983) 18
Christopher v. Harbury, 536 U.S. 403 (2002) 6-7, 10, 11
Conley v. Gibson, 355 U.S. 41 (1957) 9
Doe v. Unocal Corp., 395 F.3d 932 (9th Cir.), *reh. en banc granted*, 395 F.3d 978 (9th Cir. 2000) ... 15
Doe v. Unocal Corp., 110 F. Supp. 2d 1294 (C.D. Cal. 2000) 15
Doe v. Wal-Mart Stores, Inc., No. CV 05-7307 NM (C.D. Calif.) 17
Filartiga v. Irala, 630 F.2d 876 (2d Cir. 1980) 13
Havoco of America, Ltd. v. Shell Oil Co., 626 F.2d 549 (7th Cir. 1980) 19
Heart Disease Res. Found. v. General Motors Corp., 463 F.2d 98 (2d Cir. 1970) 4
Hoover v. Ronwin, 456 U.S. 558 (1984) 18
In re: International Business Machines, Inc., 687 F.2d 591 (2d Cir. 1982) 17
Kasky v. Nike, Inc., 27 Cal. 4th 939 (2002) 16
Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163 (1993) 9
Nike, Inc. v. Kasky, 539 U.S. 654 (2003) (per curiam) 17

Page

Sosa v. Alvarez-Machain,
542 U.S. 692 (2004) 13, 14, 15
Swierkiewicz v. Sorema N.A.,
534 U.S. 506 (2002) 9, 11

Statutes and Rules:

Clayton Act, § 4; 15 U.S.C. § 15 18

Sherman Act, § 1; 15 U.S.C. § 1 ..... 3, 12

Alien Tort Statute, 28 U.S.C. § 1350 ..... 13, 14, 15

Cal. Bus. & Prof. Code § 17200 (UCL) 15, 16, 17
Cal. Bus. & Prof. Code § 17203 16

Fed.R.Civ.P. 8(a) 4, 5, 7, 13
Fed.R.Civ.P. 8(a)(2) 6, 8
Fed.R.Civ.P. 9(b) 6
Fed.R.Civ.P. 12(b)(6) ..... *passim*

Miscellaneous:

Daniel Diskin, *The Historical and Modern Foundations for Aiding and Abetting Liability Under the Alien Tort Statute*, 47 ARIZ. L. REV. 805 (2005) 14

Paul Magnusson, "A Milestone for Human Rights," *Business Week*, Jan. 24, 2005, at 63 15

Justine O'Dell, *Trouble Abroad: Microsoft's Antitrust Problems Under the Law of the European Union*, 30 GA. J. INT'L & COMP. L. 101 (2001) 17

William H. Wagener, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Anti-Trust Litigation*, 78 N.Y.U. L. REV. 1887 (2003) 19

IN THE
SUPREME COURT OF THE UNITED STATES

No. 05-1126

BELL ATLANTIC CORPORATION, *et al.*,
Petitioners,

v.

WILLIAM TWOMBLY, *et al.*, individually
and on behalf of all others similarly situated,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free-enterprise, individual rights, and a limited and accountable government. To that end, WLF has frequently appeared as *amicus curiae* in this and other federal courts to

---

[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

address the proper scope of the antitrust laws. *See, e.g., Texaco v. Dagher*, 126 S. Ct. 1276 (2006); *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 126 S. Ct. 1281 (2006); *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 126 S. Ct. 860 (2006); *Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 298 (2004); *3M Co. v. LePage's, Inc.*, 542 U.S. 953 (2004).

WLF believes that the object of the antitrust laws should be to promote competition and thereby provide consumers with better goods and services at lower prices. Accordingly, producers who compete vigorously – whether by lowering their prices or otherwise taking steps to meet the competition – should generally be applauded. The antitrust laws do, of course, prohibit conspiracies in restraint of trade. But if we require companies to comply with massively expensive discovery requests in antitrust suits that may allege such conspiracies but that provide no specific allegations suggesting that a conspiracy actually took place, WLF fears that business will be conducted less efficiently and the antitrust laws will end up discouraging the very competition they were designed to promote.

WLF has no direct financial interest in the outcome of this case. It is filing due solely to its interest in ensuring that the antitrust laws are used to promote competition, not to enrich plaintiffs' lawyers at the expense of the business community. WLF is filing this brief with the consent of all parties. The written consents have been lodged with the Clerk of the Court.

STATEMENT OF THE CASE

Petitioners are four companies that maintain telephone networks and provide local telephone service in areas covered

by their networks (Incumbent Local Exchange Carriers or "ILECs"). Respondents (referred to herein collectively as "Twombly") are two individuals who complain that the ILECs are not doing enough to facilitate competition in the provision of local telephone service. Specifically, Twombly alleges that Petitioners have conspired, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 (2000), not to compete with one another in their respective geographic markets for local telephone and high-speed Internet service, and to prevent competitors from entering those markets. Pet. App. 2a-3a.

Twombly alleges no facts directly indicating that Petitioners entered into an actual agreement to restrain trade. They do not allege, for example, the date (or even the approximate year) of any agreement, where the agreement took place, who among Petitioners' hundreds of thousands of employees entered into the agreement, or why Petitioners would enter into such an agreement given that Petitioners' behavior in resisting competition from Competitive Local Exchange Carriers ("CLECs") is fully consistent with economic self-interest. Instead, the Complaint makes clear, Twombly's conspiracy allegation is based solely on two factual claims: (1) all Petitioners have opted not to enter the CLEC business and compete for customers in the other Petitioners' territories; and (2) a newspaper article attributed to an executive of one of the Petitioners an unwillingness to enter into such competition.

The district court granted Petitioners' motion, filed pursuant to Fed.R.Civ.P. 12(b)(6), to dismiss the complaint for failure to state a claim on which relief could be granted. Pet. App. 35a-58a. The court recognized that in evaluating a Rule 12(b)(6) motion, all facts alleged in the complaint must be accepted as true and "[a]ll reasonable inferences are to be drawn in the plaintiffs' favor." *Id.* 40a. The court nonetheless

held that the facts alleged in the complaint were insufficient to support Twombly's conclusion that Petitioners had "conspired" to restrain trade – and that such an actual agreement among competitors to restrain trade is necessary to establish a cause of action under Section 1. The court said that where plaintiffs base their conspiracy claims on allegations that the defendants have engaged in "parallel action," a complaint must point to at least one "plus factor" that "tends to exclude independent self-interested conduct as an explanation for defendants' parallel behavior." *Id.* 41a. The court determined that where, as here, the complaint consists of nothing more than "'a bare bones statement of conspiracy or of injury under the antitrust laws without any supporting facts,'" dismissal of the complaint is warranted. *Id.* 42a (quoting *Heart Disease Res. Found. v. General Motors Corp.*, 463 F.2d 98, 100 (2d Cir. 1970)). The court explained that requiring allegations of a "plus theory" is "necessary to give defendants notice of plaintiff's theory of the conspiracy" because:

> [A] plaintiff's factual and economic theory of a conspiracy is not evident from a conclusory allegation of conspiracy, and there is simply no way to defend against such a claim without having some idea of how and why the defendants are alleged to have conspired. The plus factors are therefore intended to give defendants notice of plaintiffs' legal theory, and of the conduct which is alleged to be conspiratorial.

Id. 45a (citation omitted).

The Second Circuit vacated the judgment and remanded for further proceedings. *Id.* 1a-34a. The court concluded that the district court's "plus factor" standard was incompatible with the notice pleading standard of Fed.R.Civ.P. 8(a). The

court held that a complaint that alleges the existence of a conspiracy in violation of Section 1 of the Sherman Act is not subject to dismissal under Rule 12(b)(6) unless "a pleaded conspiracy is implausible on the basis of the facts as pleaded – if the allegations amount to no more than unlikely speculations." *Id.* at 20a (citation omitted). But an antitrust complaint that can pass this "implausibility" test is not subject to dismissal so long as it "contain[s] the 'short and plain statement of the claim showing that the pleader is entitled to relief' that Rule 8(a) requires." *Id.*

The appeals court recognized that permitting complaints of this sort to proceed past the pleadings stage can have significant costs:

> We are mindful that a balance is being struck here, that on one side of that balance is the sometimes colossal expense of undergoing discovery, that such costs themselves likely lead defendants to pay plaintiffs to settle what would ultimately be shown to be meritless claims, that the success of such meritless claims encourages others to be brought, and that the overall result may well be a burden on the courts and a deleterious effect on the manner in which and efficiency with which business is conducted.

Id. at 30a. The court said that despite those costs, it was constrained by Rule 8(a) to permit the suit to proceed through discovery. *Id.* While conceding that "the amended complaint does not identify specific instances of conspiratorial conduct of communications," the appeals court said that it met the minimum standards of Rule 8(a) because "it does set forth the temporal and geographic parameters of the alleged illegal activity and identifies the alleged key participants." *Id.* 31a.

REASONS FOR GRANTING THE PETITION

This case presents an issue of exceptional importance to hundreds of thousands of federal court litigants throughout the United States: what level of specificity must be included in allegations set forth in a complaint, for the complaint to survive a Rule 12(b)(6) motion to dismiss for failure to state a claim? Petitioners have ably demonstrated that the federal appeals courts are sharply divided on that question in the context of antitrust cases, thereby warranting the Court's review.

WLF is writing separately to emphasize that the issue arises just as frequently outside the antitrust context. This Court's decisions have established several ground rules for determining the adequacy of the allegations of a complaint:

(1) Fed.R.Civ.P. 8(a)(2) provides that, in setting forth a claim in a pleading, a party need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief"; the only exception is that, pursuant to Fed.R.Civ.P. 9(b), in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity;

(2) The "short and plain statement of the claim" does not adequately show that the pleader is entitled to relief unless it provides the defendant "fair notice" of what the plaintiff's claim is and the grounds upon which it rests;

(3) Defendants have not been provided "fair notice" if they are "left to guess," *Christopher v. Harbury*, 536

> U.S. 403, 418 (2002), at the essential features of the grounds upon which the claim rests.

The decision below has established a standard for evaluating the adequacy of the allegations of a complaint that is significantly less demanding than the already-lenient standard contemplated by Rule 8(a) and this Court's prior decisions. The Second Circuit has decreed that a complaint can survive a Rule 12(b)(6) motion to dismiss if it alleges a "conspiracy" but fails to allege any facts that, if later proved, would establish the existence of a conspiracy, so long as the alleged conspiracy is not "implausible on the basis of the facts as pleaded – if the allegations amount to no more than unlikely speculations." Pet. App. 20a. That standard is difficult to square with one that requires a complaint to provide "fair notice" of the claim; simply because it is not "implausible" that some unspecified employee of a large company at some unspecified time and place entered into a conspiracy does not mean that the company has "fair notice" of the nature of the alleged conspiracy. Review is warranted to resolve the conflict between the decision below and the decisions of this Court and other courts of appeals.

Review is particularly warranted because of the enormous unjustified expense that a defendant incurs if its Rule 12(b)(6) motion to dismiss is denied under an inappropriately lenient pleading standard and it is forced to defend the suit through the discovery phase. As the Second Circuit recognized, the expense of undergoing discovery is "sometimes colossal," and "such costs themselves likely lead defendants to pay plaintiffs to settle what would ultimately be shown to be meritless claims." *Id.* at 30a.

Unfortunately, WLF has seen evidence that all too often, federal courts have permitted suits to continue beyond the

pleading stage based on nothing more than idle speculation that the defendant may have engaged in wrongdoing. While some such suits have involved alleged antitrust conspiracies, the problem is by no means confined to that area of the law. This brief describes several other areas of the law where the problem is also rampant. Review is warranted to permit the Court to make clear that all complaints – not just those raising antitrust conspiracy claims -- are subject to dismissal under Rule 12(b)(6) if they fail to provide the defendants with fair notice of the grounds upon which the claim rests.

I. THE DECISION BELOW PERMITS A COMPLAINT TO SURVIVE A MOTION TO DISMISS EVEN WHEN THE COMPLAINT FAILS TO CONTAIN SUFFICIENT FACTUAL ALLEGATIONS TO PROVIDE FAIR NOTICE OF THE GROUNDS FOR THE CLAIM

Review of the decision below is warranted because the Second Circuit's pleading standard – which permits a complaint to survive a motion to dismiss even when the complaint fails to contain sufficient factual allegations to provide fair notice of the grounds for the claim – cannot be squared with the prior decisions of this Court.

WLF recognizes that the Federal Rules of Civil Procedure do not impose demanding requirements on those filing pleadings which set forth a claim for relief. Under Fed.R.Civ.P. 8(a)(2), a party, when setting forth a claim in a pleading, need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief." The Court has explained:

> [T]he Rule mean[s] what is sa[ys]: "The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim."

Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168 (1993) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

Nonetheless, the Court has made clear that "the short and plain statement of the claim" must be sufficient to show that "the pleader is entitled to relief." To meet that standard, the statement must "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley*, 355 U.S. at 47. In *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), the Court explained the "fair notice" requirement in some detail. The plaintiff's complaint alleged that the defendant employer had terminated the plaintiff's employment on the basis of invidious age and national origin discrimination. The Court held that the complaint provided "fair notice" of the claim and the grounds upon which it rested by: (1) detailing the events leading up to the plaintiff's termination, including the names of the individuals involved in those events; (2) providing the relevant dates; and (3) providing the ages and nationalities of at least some of the relevant persons involved with his termination. *Swierkiewicz*, 534 U.S. at 514. In light of those allegations, the Court rejected the employer's claim that the complaint was deficient because it did not provide additional factual allegations to support the claim that the defendant's agents (identified in the complaint) had acted with an improper discriminatory motive. *Id.* at 514-15.

Twombly's amended complaint has come nowhere close to providing the type of "fair notice" provided by the complaint in *Swierkiewicz*. It alleges no facts directly

indicating that Petitioners entered into an actual agreement to restrain trade. It fails to allege, for example, the date (or even the approximate year) of any agreement, where the agreement took place, or who among Petitioners' hundreds of thousands of employees entered into the agreement. Perhaps most importantly, Twombly has failed to explain why Petitioners would enter into such an agreement given that their behavior in resisting competition from CLECs and in not entering a new field (*i.e.*, not becoming CLECs themselves) is fully consistent with economic self-interest. As the district court held, where "parallel action" among competitors is fully explainable as "independent self-interested conduct," the existence of such parallel action provides *no* factual support for a bald conspiracy claim. Pet. App. 41a. Under such circumstances, "fair notice" has not been provided because "there is no way to defend against such a claim without having some idea of how and why the defendants are alleged to have conspired." *Id.* 45a.

The Second Circuit held below that a complaint alleging conspiracy is sufficient to withstand a Rule 12(b)(6) motion to dismiss so long as the alleged conspiracy is not "implausible on the basis of the facts as pleaded." Such a standard totally ignores the "fair notice" requirement. That requirement entails more than an exercise in the plausible. While Twombly has alleged nothing that makes it wholly implausible that Petitioners entered into a conspiracy in restraint of trade, he likewise has alleged nothing to make it any more likely that Petitioners entered into such a conspiracy than that *any other* random set of competitors have entered into such a conspiracy.

The Cou . s decision in *Christopher v. Harbury*, 536 U.S. 403 (2002), is instructive in this regard. The plaintiff in that case alleged that federal government officials had acted wrongfully in denying her access to the courts. She alleged

that the officials had lied to her by telling her that they were unaware of the whereabouts of her husband when, in fact, they knew he was in a Guatemalan jail being subjected to torture – thereby preventing her from filing a court action that might have prevented his eventual execution. Accepting for the sake of decision that such denial of access to the courts constituted a constitutional violation, the Court nonetheless held that the complaint was properly subject to dismissal under Rule 12(b)(6) because it "did not come even close" to stating a claim upon which relief could be granted. *Harbury*, 536 U.S. at 418. Even though the complaint admittedly set out a "plain statement" regarding what the defendants allegedly did wrong, it did not provide "fair notice" to the defendants of the claim because it failed to explain what legal recourse the plaintiff could have obtained if her access to the courts had not been blocked: "Like any other element of an access claim, the underlying cause of action and its lost remedy must be addressed by allegations in the complaint sufficient to give fair notice to a defendant." *Id.* at 416 (citing *Swierkiewicz*, 534 U.S. at 513-15).

The Court said that in a complaint alleging denial of access to the courts, the underlying claim must be pleaded and must have at least an "arguable" basis; the Court held that the claim must "be described well enough" in the complaint to show that its "'arguable' nature" amounts to "more than hope." *Id.* Similarly, Twombly's amended complaint cannot survive a Rule 12(b)(6) motion to dismiss in the absence of allegations indicating that Twombly's conspiracy claim is based on "more than hope." Moreover, as in *Harbury*, in the absence of such allegations, "[t]he District Court and the defendants were left to guess" regarding the who, when, where, how, and why of the alleged conspiracy. *Id.* at 418. Review is warranted because the standard applied by the Second Circuit mandates that complaints such as Twombly's should survive a motion to

dismiss despite their failure to provide a "statement of the claim showing that the pleader is entitled to relief" and to provide fair notice of the claim.

II. THERE IS WIDESPREAD UNWILLINGNESS AMONG THE LOWER FEDERAL COURTS TO GRANT MERITORIOUS RULE 12(b)(6) MOTIONS TO DISMISS, RESULTING IN WASTEFUL LITIGATION AND NUISANCE SETTLEMENTS

The Petition fully explains why the decision below not only conflicts with the prior decisions of this Court and other circuits but also presents a recurring issue of substantial importance in the field of antitrust law. WLF writes separately to stress that review is also warranted because the decision below will have substantial impact in numerous cases not involving Sherman Act Section 1 conspiracy claims. Indeed, the unwillingness of the lower federal courts to grant meritorious Rule 12(b)(6) motions to dismiss has been a widespread problem that has resulted in wasteful litigation and nuisance settlements.

The Second Circuit readily acknowledged that permitting complaints of this sort to proceed past the pleadings stage can have significant costs:

> We are mindful that a balance is being struck here, that on one side of that balance is the sometimes colossal expense of undergoing discovery, that such costs themselves likely lead defendants to pay plaintiffs to settle what would ultimately be shown to be meritless claims, that the success of such meritless claims encourages others to be brought, and that the overall result may well be a burden on the courts and a deleterious effect on the

> manner in which and efficiency with which business is conducted.

Pet. App. 30a. In light of those acknowledged costs, review is warranted to determine whether, as the Second Circuit believed, those costs are really necessitated by the terms of Fed.R.Civ.P. 8(a).

Moreover, those costs – including resulting payments to settle what would ultimately be shown to be meritless claims – are not confined to Section 1 cases. This brief highlights recurring claims in other areas of the law in which the inability of defendants to prevail on meritorious Rule 12(b)(6) motions to dismiss has forced the settlement of numerous suits despite what often appear to be factually insufficient allegations in the complaint.

The Alien Tort Statute. The Alien Tort Statute (ATS), 28 U.S.C. § 1350, provides the federal courts with jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Adopted in 1789, the ATS lay dormant for nearly 200 years until the Second Circuit held in 1980 that federal courts had jurisdiction under the ATS to hear claims that a Paraguayan police officer had tortured a fellow citizen. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). This Court held in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 720 (2004), that "Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations." That set of actions includes three offenses recognized by Blackstone in the 18th century – "violations of safe conducts, infringement of the rights of ambassadors, and piracy" – as well as additional actions whose scope the Court did not attempt to define: violations of "the present-day law of nations" that "rest on a norm of international character accepted by the

civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." *Sosa*, 542 U.S. at 725.

Although the Court warned that the lower courts should exercise "great caution in adapting the law of nations to private rights," *id* at 729, the number of ATS suits pending in federal court has exploded in recent years. A primary target of these suits has been American multi-national corporations whose overseas activities are alleged to violate international law. A common theme of many of these suits is an allegation that foreign governments mistreated their own citizens while providing security for an American corporation's operations, and that the corporation should be found liable in an ATS suit for aiding and abetting the mistreatment. *See, e.g.*, Daniel Diskin, *The Historical and Modern Foundations for Aiding and Abetting Liability under the Alien Tort Statute*, 47 ARIZ. L. REV. 805 (2005) (collecting cases).

Despite the absence in most such cases of factual allegations that the American corporations played any direct role in a foreign government's alleged mistreatment of its citizens, corporate defendants have had very little success in prevailing in Rule 12(b)(6) motions to dismiss the suits. The lower federal courts have accepted non-specific allegations that the corporate defendants aided and abetted the foreign government as sufficient to withstand a motion to dismiss.

Perhaps the best-known example of the huge costs imposed on corporate defendants by ATS suits raising insubstantial claims of human rights violations is a suit filed against Unocal Corp. in connection with its construction of a natural gas pipeline in Burma (now Myanmar). The plaintiffs, 15 Myanmar citizens, alleged that government soldiers providing security for the pipeline engaged in murder, torture,

rape, and forced labor – in violation of international law. They sued Unocal for allegedly aiding and abetting in those violations. Despite the absence of allegations that Unocal's misconduct consisted of anything more than knowledge of the soldiers' alleged actions and profiting from them,[2] Unocal could not win Rule 12(b)(6) dismissal of the claims. *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000). After several years of extensive discovery, Unocal eventually prevailed in the district court on summary judgment, only to have that victory overturned by a Ninth Circuit panel. *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir.), *reh. en banc granted*, 395 F.3d 978 (9th Cir. 2002). After *Sosa* was decided but before the case could be reheard *en banc*, the parties entered into a confidential settlement. Published accounts suggest that Unocal paid close to $30 million to settle the case. *See* Paul Magnusson, "A Milestone for Human Rights," *Business Week*, Jan. 24, 2005, at 63.

Unocal is hardly alone among American corporations in facing insubstantial allegations under the ATS that it violated a international law norm accepted by the civilized world by aiding and abetting a foreign government's alleged mistreatment of its own citizens. Dozens of such suits are pending following unsuccessful efforts to win dismissal under Rule 12(b)(6).

California Unfair Competition Law. California's unfair competition law (UCL), Cal. Bus. & Prof. Code § 17200, permits private individuals to sue businesses that engage in unfair competition and to seek injunctive relief and/or restitution. The UCL has become a favorite tool of

---

[2] Indeed, it is doubtful that aiding and abetting others' violations of customary international law would meet *Sosa*'s exacting standards regarding what is actionable under the ATS.

those seeking to improve working conditions at overseas factories that produce goods sold in this country. Those individuals often initiate publicity campaigns against American companies that import goods made in factories that, in the view of those individuals, enforce substandard working conditions. If the companies respond by denying the charges, they often find themselves the target of a suit filed under the UCL, alleging that the company engaged in an unfair business practice by falsely denying the charges. In many cases, the plaintiffs do not even allege that they were injured by the alleged unfair competition.[3] Suits following this pattern are pending both in California state courts and in federal court. *See generally,* Mathieu Blackston, *California's Unfair Competition Law – Making Sure the Avenger Is Not Guilty of the Greater Crime,* 41 SAN DIEGO L. REV. 1833 (2004).

The most famous suit of this type involved Nike, Inc., whose products are manufactured by subcontractors at more than 700 facilities around the world. Nike was sued under the UCL for issuing statements denying that workers at those overseas facilities were subject to substandard working conditions. Although the lower courts sustained a demurrer, the California Supreme Court reinstated the suit, holding that Nike's speech was subject to regulation by means of UCL lawsuits because it was commercial speech that was not entitled to full First Amendment protection. *Kasky v. Nike, Inc.,* 27 Cal. 4th 939 (2002). This Court granted a writ of certiorari to consider Nike's First Amendment claims, then

---

[3] California voters in 2004 adopted Proposition 64, which amended the UCL to add a requirement that private suits to enjoin allegedly unfair competition could only be brought by those claiming to have been injured by the allegedly objectionable conduct. *See* Cal. Bus & Prof. Code § 17203. Nonetheless, many UCL cases are being filed by plaintiffs with highly attenuated damage claims.

later dismissed the writ as improvidently granted. *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (per curiam). Nike soon thereafter agreed to settle the case rather than continue to incur substantial discovery costs.

Although *Nike* was decided on First Amendment grounds, an issue in many of the UCL cases challenging a corporation's denial of substandard labor conditions at overseas manufacturing facilities is that the claims of falsity are often quite vague and do not identify *specific* factual claims that are alleged to be false. *See, e.g., Doe v. Wal-Mart Stores, Inc.*, No. CV 05-7307 NM (C.D. Calif.) (motion to dismiss pending). Nonetheless, despite the absence of specific allegations of falsity, federal courts hearing such claims have generally allowed the cases to proceed to full discovery.

Antitrust Claims. The problem of factually unsupported antitrust complaints being permitted to proceed through the pleadings stage is by no means confined to Section 1 cases. Perhaps the most notorious example of a baseless antitrust case being allowed to go forward is the federal government's monopolization claim against IBM, filed in 1969 and not dismissed until the early 1980s. The government ultimately moved to dismiss the case voluntarily on the ground that it was "without merit" – presumably a concession that the case should not have survived a Rule 12(b)(6) motion to dismiss. *In re: International Business Machines, Inc.*, 687 F.2d 591, 594 (2d Cir. 1982). Yet, the case was permitted to go through six years of discovery and seven years of trial, at a cost to the government of $16.8 million and a cost to IBM of between $50 and $100 million. *See* Justine O'Dell, *Trouble Abroad: Microsoft's Antitrust Problems Under the Law of the European Union*, 30 GA. J. INT'L & COMP. L. 101, 115 (2001).

In *Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 519 (1983), this Court commented directly on the inappropriate failure of the lower courts to dismiss an antitrust case on the pleadings. *Associated General Contractors* involved a suit under § 4 of the Clayton Act by a labor union against certain employers alleged to have engaged in a group boycott of unionized subcontractors. The Ninth Circuit allowed the suit to go forward; not until eight years after suit was filed did this Court dismiss the case on the pleadings. The Court made clear that the lower courts should never have permitted the case, which required the defendants to incur significant expenses, to proceed past an initial motion to dismiss: "Had the District Court required the Union to describe the nature of the alleged coercion with particularity before ruling on the motion to dismiss, it might well have been evident that no violation of the law had been alleged." *Associated General Contractors*, 459 U.S. at 521.

Review is warranted to provide guidance to the lower federal courts regarding the importance of granting Rule 12(b)(6) motions to dismiss if, after accepting all facts alleged in the complaint as true and drawing all reasonable inferences in the plaintiff's favor, the court nonetheless finds that the complaint fails to state a claim upon which relief can be granted. As the Court has recognized, permitting claims to proceed past the pleadings stage, particularly in complex antitrust cases, forces a defendant "to bear [a] substantial 'discovery and litigation' burden." *Hoover v. Ronwin*, 456 U.S. 558, 580 n.34 (1984). Moreover, the threat of unfounded yet expensive antitrust litigation will often deter firms from engaging in the vigorous competition that the antitrust laws were meant to encourage. *See* William H. Wagener, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Anti-Trust Litigation*, 78 N.Y.U. L. REV. 1887, 1921

n.8 (2003) ("If plaintiffs can extract sizable settlements by filing frivolous lawsuits capable of surviving motions to dismiss, potential defendants will avoid engaging in any behavior that could be construed as anticompetitive, further dampening these firms' incentives to compete aggressively."). The lower federal courts need to be reminded that "if the allegations of the complaint fail to establish the requisite elements of the cause of action, our requiring costly and time consuming discovery and trial work would represent an abdication of our judicial responsibility." *Havoco of America, Ltd. v. Shell Oil Co.*, 626 F.2d 549, 553 (7th Cir. 1980).

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Dated: April 6, 2006

Supreme Court, U.S.
FILED
AUG 25 2006
OFFICE OF THE CLERK

22

No. 05-1126

IN THE

Supreme Court of the United States

BELL ATLANTIC CORPORATION, *ET AL.*,
Petitioners,
v.
WILLIAM TWOMBLY, *ET AL.*, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT APPENDIX

J. DOUGLAS RICHARDS
Counsel of Record
MICHAEL M. BUCHMAN
MILBERG WEISS BERSHAD & SCHULMAN LLP
One Pennsylvania Plaza
49th Floor
New York, New York 10119-0165
(212) 594-5300
Counsel for Respondents

MICHAEL K. KELLOGG
Counsel of Record
MARK C. HANSEN
SEAN A. LEV
AARON M. PANNER
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
Counsel for AT&T Inc. (formerly SBC Communications Inc.)

August 25, 2006

(additional counsel listed on inside cover)

PETITION FOR A WRIT OF CERTIORARI FILED: MARCH 6, 2006
CERTIORARI GRANTED: JUNE 26, 2006

STEPHEN M. SHAPIRO
KENNETH S. GELLER
RICHARD J. FAVRETTO
MAYER, BROWN, ROWE
& MAW LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

LAURA J. COLEMAN
J. HENRY WALKER
MARC W.F. GALONSKY
ASHLEY WATSON
BELLSOUTH CORPORATION
1155 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 249-2720
Counsel for BellSouth Corporation

RICHARD G. TARANTO
FARR & TARANTO
1220 19th Street, N.W., Suite 800
Washington, D.C. 20036
(202) 775-0184

JOHN THORNE
PAUL J. LARKIN, JR.
DAVID E. WHEELER
ROBERT J. ZASTROW
VERIZON COMMUNICATIONS INC.
1515 North Courthouse Road
Arlington, Virginia 22201
(703) 351-3900

DAN K. WEBB
CHARLES B. MOLSTER III
WINSTON & STRAWN LLP
35 W. Wacker Drive
Chicago, Illinois 60601
(312) 558-5856
Counsel for Verizon
Communications Inc.
(successor-in-interest to
Bell Atlantic Corporation)

CYNTHIA P. DELANEY
QWEST COMMUNICATIONS
INTERNATIONAL INC.
1801 California Street
Denver, Colorado 80202
(303) 383-6790

TIMOTHY BEYER
BROWNSTEIN HYATT
& FARBER, P.C.
410 17th Street, 22nd Floor
Denver, Colorado 80202
(303) 223-1116
Counsel for Qwest
Communications International Inc.

JAVIER AGUILAR
WILLIAM M. SCHUR
AT&T SERVICES, INC.
175 E. Houston Street, 4th Floor
San Antonio, Texas 78205
(210) 351-3409
Counsel for AT&T Inc. (formerly
SBC Communications Inc.)

JOSEPH H. MELTZER
SCHIFFRIN & BARROWAY, LLP
Three Bala Plaza East
Suite 400
Bala Cynwyd, Pennsylvania 19004
(610) 667-7706
Counsel for Respondents

TABLE OF CONTENTS

Page

Relevant Docket Entries:

United States District Court for the Southern District of New York, *Twombly, et al. v. Bell Atlantic Corp., et al.*, No. 02 CIV. 10220 (GEL) 1

United States Court of Appeals for the Second Circuit, *Twombly, et al. v. Bell Atlantic Corp., et al.*, No. 03-9213 6

Consolidated Amended Class Action Complaint, *Twombly, et al. v. Bell Atlantic Corp., et al.*, No. 02 CIV. 10220 (GEL) (S.D.N.Y. filed Apr. 11, 2003) 10

Exhibit A (map of RBOC Territories) 37

Exhibit B (map of Verizon Wireless Presence) 38

Declaration of Steven G. Bradbury, attached to Motion of Defendants Bell Atlantic Corporation, BellSouth Corporation, Qwest Communications International Inc., SBC Communications Inc., and Verizon Communications Inc. To Dismiss the Consolidated Amended Complaint, *Twombly, et al. v. Bell Atlantic Corp., et al.*, No. 02 CIV. 10220 (GEL) (S.D.N.Y. filed May 12, 2003) (excerpt) 39

Exhibit D (Jon Van, *Ameritech Customers Off Limits: Notebaert*, Chicago Tribune (Oct. 31, 2002)) 41

Exhibit E (Jon Van, *Lawmakers Seek Probe of Bells*, Chicago Tribune (Dec. 19, 2002)) 44

Exhibit F (Letter from Rep. John Conyers and Rep. Zoe Lofgren to Hon. John D. Ashcroft, Attorney General (Dec. 18, 2002)) 46

Affidavit of Michael M. Buchman, attached to Opposition to BellSouth's Motion To Dismiss for Lack of Personal Jurisdiction and Improper Venue, *Twombly, et al. v. Bell Atlantic Corp., et al.*, No. 02 CIV. 10220 (GEL) (S.D.N.Y. filed June 20, 2003) (excerpt) 50

Exhibit A (148 Cong. Rec. H574-H575, H590-H591 (Feb. 27, 2002)) (excerpt) 54

Exhibit B (H.R. Rep. No. 107-83 (June 18, 2001)) (excerpt) 59

Exhibit C (Chris Nolter, *Taking the Local*, The Deal, June 2, 2003, at 22) 73

Exhibit D (Jon Van, *Ameritech Customers Off Limits: Notebaert*, Chicago Tribune (Oct. 31, 2002)) 41

Hearing Transcript, *Twombly, et al. v. Bell Atlantic Corp., et al.*, No. 02 CIV. 10220 (GEL) (S.D.N.Y. Aug. 1, 2003) (excerpt) 81

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 02 CIV. 10220 (GEL)

WILLIAM TWOMBLY AND LAWRENCE MARCUS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

BELL ATLANTIC CORPORATION, BELLSOUTH CORPORATION, QWEST COMMUNICATIONS INTERNATIONAL INC., SBC COMMUNICATIONS INC., AND VERIZON COMMUNICATIONS INC.,
Defendants.

DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
12/23/02	1	COMPLAINT filed. Summons issued and Notice pursuant to 28 U.S.C. 636(c). FILING FEE $ 150.00 RECEIPT # 460132. (laq) (Entered: 12/27/2002)
		* * * * *
3/14/03	12	ORDER: case 03cv1567 (GEL) (as member case) shall be consolidated with 02cv10220 (GEL) (as lead case), this order shall be entered in 03cv1567 (GEL). No further filings shall be filed under 03cv1567 (GEL), without prior permission of the Court. (signed by Judge Gerard E. Lynch) (db) (Entered: 03/17/2003)

* * * * *

4/14/03	24	CONSOLIDATED AMENDED CLASS ACTION COMPLAINT by William Twombly (Plaintiffs) (Answer due 4/24/03 for Verizon Comm., for SBC Communication, for QWEST Communications, for BellSouth Corp., for Bell Atlantic) amending [1-1] complaint; Summons issued. (sb) (Entered: 04/23/2003)

* * * * *

5/12/03	32	NOTICE OF MOTION by Bell Atlantic, BellSouth Corp., QWEST Communications, SBC Communication, Verizon Comm. to dismiss the Amended Complaint; Return Date not indicated (cd) (Entered: 05/14/2003)
5/12/03	33	DECLARATION of Steven G. Bradbury by Bell Atlantic, BellSouth Corp., QWEST Communications, SBC Communication, Verizon Comm. in support Re: [32-1] motion to dismiss the Amended Complaint. (cd) (Entered: 05/14/2003)

* * * * *

5/12/03	36	MEMORANDUM OF LAW by Bell Atlantic, BellSouth Corp., QWEST Communications, SBC Communication, Verizon Comm. in support of [32-1] motion to dismiss the Amended Complaint. (cd) (Entered: 05/14/2003)
5/19/03	39	NOTICE OF MOTION by Bell Atlantic, BellSouth Corp., QWEST Communications, SBC Communication, Verizon Comm. for an order purs. to Rule 26(c) of the FRCP staying discovery. Return Date

5/29/03. Proposed order attached. (sb) (Entered: 05/22/2003)

5/19/03 40 MEMORANDUM OF LAW by Bell Atlantic, BellSouth Corp., QWEST Communications, SBC Communication, Verizon Comm. in support of [39-1] motion for an order purs. to Rule 26(c) of the FRCP staying discovery. (sb) (Entered: 05/22/2003)

* * * * *

5/21/03 41 CERTIFICATION of Maria T. Galeno by Bell Atlantic, BellSouth Corp., QWEST Communications, SBC Communication, Verizon Comm. in support of [39-1] motion for an order purs. to Rule 26(c) of the FRCP staying discovery. (sb) (Entered: 05/22/2003)

* * * * *

6/20/03 49 MEMORANDUM OF LAW by William Twombly in opposition to [32-1] motion to dismiss the Amended Complaint, [30-1] motion to dismiss the consolidated Amended Complaint. (rec'd in the night deposit box on 6/20/03 at 10:11 p.m.) (sac) (Entered: 06/24/2003)

* * * * *

6/20/03 51 AFFIDAVIT of Michael M. Buchman by William Twombly in support of [50-1] opposition memorandum, [49-1] opposition memorandum. (sac) (Entered: 06/24/2003)

* * * * *

6/30/03 53 REPLY MEMORANDUM by Bell Atlantic, BellSouth Corp., QWEST Communications, SBC Communication, Verizon Comm. in support re: [30-1] motion to dis-

miss the consolidated Amended Complaint . (dle) (Entered: 07/07/2003)

* * * * *

10/7/03	57	Transcript of record of proceedings before Judge Gerard E. Lynch for the date(s) of 8/1/03. (df) (Entered: 10/07/2003)
10/8/03	58	OPINION AND ORDER #89177, granting [32-1] motion to dismiss the Amended Complaint, denying, as moot, [30-1] motion to dismiss the consolidated Amended Complaint. (signed by Judge Gerard E. Lynch); Sent to the Judgment Clerk. (kw) (Entered: 10/13/2003)
10/15/03	59	JUDGMENT, that for the reasons stated in the Court's Opinion (89177) and Order dated October 7, 2003, defendants' motion to dismiss the complaint is granted and defendant BellSouth's motion to dismiss for lack of personal jurisdiction is denied as moot. (signed by J. Michael McMahon, Clerk of Court); Mailed copies and notice of right to appeal. Entered On Docket: 10/16/03. (tp) (Entered: 10/16/2003)
10/15/03		Case closed. (tp) (Entered: 10/16/2003)
11/14/03	60	NOTICE OF APPEAL by William Twombly, Lawrence Marcus from [59-1] judgment order, [58-1] order. Copies of notice of appeal mailed to Attorney(s) of Record: Mayer, Brown, Rowe & Maw, LLP. (IN N.Y.), Bellsouth Corporation, Wilmer, Cutler & Pickering,Mayer (IN N.Y.), Brown, Rowe & Maw, LLP. (IN D.C.), Wilmer, Cutler & Pickering (IN D.C.), Kellogg, Huber, Hansen, Todd & Evans, L.L.C., Kirkland & Ellis, Pilsbury

		Withrop, LLP and Verizon Communications, Inc. $255.00 Appeal filing fee paid 11/14/03 on receipt # E 491366. (dt) (Entered: 11/14/2003)
		* * * * *
1/13/06	64	MANDATE of USCA (Certified Copy) as to [60] Notice of Appeal, filed by Lawrence Marcus, William Twombly, USCA Case Number 03-9213. It is hereby Ordered, Adjudged and Decreed that the judgment of said District Court be and it hereby is VACATED AND REMANDED in accordance with the opinion of this Court. Roseann B. MacKechnie, Clerk USCA. Issued As Mandate: 1/12/06. (dt,) (Entered: 01/19/2006)
1/19/06		Transmission of USCA Mandate/Order to the District Judge re: [64] USCA Mandate. (dt,) (Entered: 01/19/2006)
		* * * * *
7/5/06	100	ORDER: It is hereby ordered that all proceedings before this Court are stayed until the Supreme Court renders its decision. The pending motions to dismiss the case (Dkt. Nos. 73 and 75) are deemed withdrawn without prejudice to restoration to the Court's docket upon letter request by either party, upon completion of the proceedings before the Supreme Court. (Signed by Judge Gerard E. Lynch on 6/28/2006) (lb) (Entered: 07/06/2006)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 03-9213

WILLIAM TWOMBLY AND LAWRENCE MARCUS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs-Appellants,

v.

BELL ATLANTIC CORPORATION, BELLSOUTH CORPORATION, QWEST COMMUNICATIONS INTERNATIONAL INC., SBC COMMUNICATIONS INC., AND VERIZON COMMUNICATIONS INC.,
Defendants-Appellees.

DOCKET PROCEEDINGS

DATE	DOCKET ENTRY
11/17/03	Copy of notice of appeal and district court docket entries on behalf of Appellant William Twombly, Appellant Lawrence Marcus filed. [03-9213] Form C due on 11/28/03. Form D due on 11/28/03. [DT]
11/17/03	Copy of district court judgment, dated 10/15/03, RECEIVED. [03-9213] [DT]
11/17/03	Copy of district court Opinion & Order, dated 10/7/03, RECEIVED. [03-9213] [DT]
* * * * *	
4/2/04	Record on appeal index in lieu of record filed. [JC]

4/12/04	APPELLANT Lawrence Marcus, William Twombly, brief FILED with proof of service. [JC]
4/12/04	APPELLANT Lawrence Marcus, William Twombly, joint appendix filed w/pfs. 2vols [JC]
4/12/04	Appellant APPELLANT Lawrence Marcus, William Twombly, special appendix filed (w/pfs) [JC]
* * * * *	
5/13/04	APPELLEE Bell Atlantic Corp., Bellsouth Corporatio, Qwest Communications, SBC Communication, ET AL, brief filed with proof of service. [JC]
5/26/04	APPELLANT Lawrence Marcus, William Twombly, reply brief filed with proof of service. [JC]
* * * * *	
9/15/04	Case heard before SACK, RAGGI, HALL, C.JJ CD DATE: 9/15/04 [RD]
9/27/04	Transcript of United States Court of Appeals oral argument dated 9/15/04 filed. [RD]
* * * * *	
12/14/04	APPELLANT Lawrence Marcus, William Twombly, 28(J) letter received. [JC]
1/31/05	APPELLANT Lawrence Marcus, William Twombly, 28(J) letter received. [JC]
2/3/05	APPELLEE SBC Communication, 28(J) letter received. [JC]
* * * * *	

3/3/05	APPELLANT Lawrence Marcus, William Twombly, 28(J) letter received. [JC]
3/10/05	Letter received from Mark C. Hansen, dated 3/8/05, in response to appellants 28(J) letter file 3/3/05 [JC]
3/22/05	APPELLANT Lawrence Marcus, William Twombly, 28(J) letter received. [JC]
3/28/05	Letter received from Mark C. Hansen, dated 3/25/05, in response to appellants 28(J) letter dated 3/22/05 [JC]
4/22/05	APPELLEE Bell Atlantic Corp., Bellsouth Corporatio, Qwest Communications, SBC Communication, ET AL, 28(J) letter received. [JC]
4/22/05	Letter in response to appellees 4/22/05 28(J) letter from APPELLANT Lawrence Marcus, William Twombly, received. [JC]
7/21/05	APPELLANT Lawrence Marcus, William Twombly, 28(J) letter received. [JC]
7/25/05	Letter received from Mark C. Hansen, dated 7/22/05 in response to appellants 7/21/05 28(J) letter. [JC]
8/2/05	APPELLANT Lawrence Marcus, William Twombly, 28(J) letter received. [JC]
8/4/05	APPELLANT Lawrence Marcus, William Twombly, 28(J) letter FILED. [JC]
8/8/05	APPELLEE Bell Atlantic Corp., Bellsouth Corporatio, Qwest Communications, SBC Communication, ET AL, 28(J) letter received. [JC]
9/6/05	APPELLANT Lawrence Marcus, William Twombly, 28(J) letter received. [JC]

9/8/05	Letter received from Mark C. Hansen, dated 9/7/05, in response to appellants 9/6/05 28(j) letter. [JC]
10/3/05	Judgment of the district court is VACATED & REMANDED by published signed opinion filed. (RDS) [JC]
10/3/05	Judgment filed. [JC]
10/3/05	Notice to counsel in re: Judgment filed 10/3/05 [JC]
* * * * *	
10/17/05	Appellee Verizon Communicatio, Appellee Bell Atlantic Corp. Petition for rehearing filed with proof of service. petition for rehearing en banc filed with proof of service. [JC]
* * * * *	
1/3/06	Order FILED DENYING motion petition for rehearing en banc by Appellee Verizon Communicatio, Appellee Bell Atlantic Corp., endorsed on motion dated 10/17/2005 [JC]
1/5/06	Notice to counsel in re: Order filed 1/3/06 denying petition for rehearing filed [JC]
1/12/06	Judgment MANDATE ISSUED. CLOSED [JC]
* * * * *	
1/24/06	Mandate receipt returned from the district court. [NS]
3/14/06	Notice of filing petition for APPELLEE Bell Atlantic Corp., Verizon Communicatio, dated 3/7/06 filed. Supreme Court #: 05-1126. [JC]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 02 CIV. 10220 (GEL)

WILLIAM TWOMBLY AND LAWRENCE MARCUS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

BELL ATLANTIC CORPORATION, BELLSOUTH CORPORATION, QWEST COMMUNICATIONS INTERNATIONAL INC., SBC COMMUNICATIONS INC., AND VERIZON COMMUNICATIONS INC.,
Defendants.

CONSOLIDATED AMENDED CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

Plaintiffs, by and through their undersigned attorneys, for their Amended Class Action Complaint allege the claims set forth herein. Plaintiffs' claims as to themselves and their own actions, as set forth in ¶¶ 9 and 10 are based upon their own knowledge. All other allegations are based upon information and belief pursuant to the investigation of counsel.

I.

NATURE OF THE ACTION

1. This lawsuit is brought as a class action on behalf of all individuals and entities who purchased local telephone and/or high speed internet services in the continental United States (excluding Alaska and Hawaii) from at least as early as February 8, 1996 and continuing to present (the "Class Period").

2. The Telecommunications Act of 1996, 47 U.S.C. §§ 151 to 614 (the "Act") was designed to promote competition for local telephone services by opening the markets to effective competition. The purpose, intent and requirements of the Act are to create competition without delay in the local telephone services markets so that the public's local telephone bills and charges will be reduced as soon as possible by virtue of such competition.

3. Local telephone services include traditional dial tone primarily used to make or receive voice, fax, or analog modem calls from a residence or business and exchange access services which allow long distance carriers to use their local exchange facilities to originate and terminate long distance calls to end users. Local telephone services also include, but is not limited to, custom calling services such as Caller ID, Call Waiting, Voice Mail and other advanced services. High speed internet services include circuits that connect customers to the internet at speeds in excess of 56K such as, but not limited to, T1 lines, asynchronous transfer mode circuits, frame relay circuits, ISDN, and digital subscriber lines ("DSL"). The rates concerning certain features or services are either not subject to tariff filing requirements and/or are not subject to any meaningful review.

4. Plaintiffs allege that Defendants entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets by, among other things, agreeing not to compete with one another and to stifle attempts by others to compete with them and otherwise allocating customers and markets to one another.

5. As a direct and proximate result of Defendants' unlawful contract, combination or conspiracy, Plaintiffs and members of the Class allege that Defendants have hindered the development of the local telephone and/or high speed internet services markets. Plaintiffs and members of the Class further allege that they have been and continue to be

denied the benefits of free and unrestrained competition for local telephone and/or high speed internet services. Plaintiffs and members of the Class have, therefore, been forced to pay supracompetitive prices for such services causing them to sustain injury to their business or property.

II.

JURISDICTION AND VENUE

6, Plaintiffs bring this class action under Sections 4 and 16 of the Clayton Act, 15 U.S.C. § 15 and 26, to recover treble damages and injunctive relief as well as reasonable attorneys' fees and costs with respect to injuries arising from violations by Defendants of the federal antitrust laws, including Section 1 of the Sherman Act. 15 U.S.C. § 1.

7. The Court has federal question subject matter jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1337(a) and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15(a) and 26. The Court has supplemental jurisdiction over the state antitrust law claims pursuant to 28 U.S.C. § 1367.

8. Venue in this district is proper pursuant to 28 U.S.C. § 1391(b)(2) because a part of the events or omissions giving rise to the claims occurred in this district, and pursuant to 28 U.S.C. § 1391(b)(3) and 15 U.S.C. §§ 15 and 22 because Defendants Bell Atlantic and Verizon have maintained or maintain a principal place of business within this district.

III.

PARTIES

9. Plaintiff William Twombly is a resident of Bethel, Connecticut. At times relevant herein, William Twombly was a resident of New York, New York and purchased local telephone and/or high speed internet services from Defendants Belt Atlantic Corporation or Verizon Communications, Inc.

10. Plaintiff Lawrence Marcus is a resident of Maple Glen, Pennsylvania. At times relevant herein, Lawrence Marcus purchased local telephone and/or high speed internet services from Defendants Bell Atlantic Corporation or Verizon Communications, Inc.

11. Defendant Bell Atlantic Corporation is a Delaware corporation with its principal place of business at 1095 Avenue of Americas, New York, New York. Bell Atlantic Corporation is a telecommunications company with principal operating subsidiaries (together with the parent company "Bell Atlantic") that provide local telephone and/or high speed internet services to subscribers in Connecticut, Delaware, Maryland, Massachusetts, Maine, New Hampshire, New York, New Jersey, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia and the District of Columbia.

12. Defendant BellSouth Corporation is a Delaware corporation with its principal place of business at 1155 Peachtree Street, N.E., Atlanta, Georgia. BellSouth Corporation, is a telecommunications company that, through its wholly owned subsidiaries including but not limited to Bell South Telecommunications, Inc. (together with the parent company "BellSouth"), provides local telephone and/or high speed internet services to millions of subscribers in Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee ("BellSouth").

13. Defendant Qwest Communications International, Inc., is a Delaware corporation with its principal place of business at 1801 California Street, Denver, Colorado. Qwest Communications International, Inc., is a telecommunications company that, through its wholly-owned subsidiaries including but not limited to Qwest Corporation, Inc (together with the parent company "Qwest"), provides local telephone and/or high speed internet services in fourteen states, including Arizona, Colorado, Idaho, Iowa, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming ("Qwest").

14. Defendant SBC Communications, Inc., is a Delaware corporation with its principal place of business at 175 East Houston, San Antonio, Texas. SBC Communications, Inc., is a telecommunications company that, through its operating subsidiaries including but not limited to SBC Ameritech, SBC Nevada Bell, SBC Pacific Bell, SBC SNET and SBC Southwestern Bell (together with the parent company "SBC"), provides local telephone and/or high speed internet services to subscribers in Arkansas, California, Connecticut, Florida, Illinois, Indiana, Kansas, Michigan, Missouri, Nevada, Ohio, Oklahoma, Texas and Wisconsin.

15. Defendant Verizon Communications, Inc. ("Verizon") is a Delaware corporation with its principal place of business at 1095 Avenue of Americas, New York, New York. GTE Corporation ("GTE") merged with and became a wholly-owned subsidiary of Bell Atlantic. Bell Atlantic now does business as Verizon Communications, Inc.

IV.

CO-CONSPIRATORS

16. Various other persons, firms, corporations and associations, not named in this Complaint, have participated in the violations alleged herein and have performed acts and made statements in furtherance thereof.

V.

BACKGROUND

A. The Bell Operating System and Divestiture

17. During the early part of its approximately 120-year history, the telephone industry experienced varying periods of competition, monopolization and regulation. By 1934, the Bell System, consisting of Bell Operating Companies, along with American Telephone and Telegraph Company ("AT&T"), owned 80 percent of all the local telephone lines and services in the United States and owned a monopoly

long-distance network. The Bell Operating Companies were wholly-owned subsidiaries of AT&T.

18. In 1934, the Communications Act of 1934 was adopted. That act severed regulation of the telephone industry from the Interstate Commerce Commission and provided for the creation of the Federal Communications Commission ("FCC") to regulate interstate telephone, telegraph and radio companies. Interstate and international telephone services fell under the aegis of the FCC, and intrastate telephone services became regulated under the auspices of respective state commissions. Once a telephone communications service crossed a state line, it fell under the jurisdiction of the FCC.

19. In 1974, the United States filed a lawsuit against AT&T alleging that it had monopolized and conspired to restrain trade in the manufacture, distribution, sale and installation of telephones, telephone apparatus equipment and materials and supplies in violation of §§ 1, 2, and 3 of the Sherman Act, 15 U.S.C. §§ 1, 2, and 3. The basic theory of the government's case, as explained by the District Court, was that AT&T had unlawfully used its control of local exchange facilities to suppress competition in related markets, such as the markets for long distance services, which are dependent upon access to the local exchange to originate and terminate calls. *United States v. AT&T*, 524 F. Supp. 1336, 1352 (D.D.C. 1981).

20. In 1982, the United States and AT&T agreed to settle the case through the entry of a consent decree. In 1982, United States District Court Judge Harold H. Greene signed the Modified Final Judgment, settling the antitrust suit against AT&T. The Modified Final Judgment was based on divestiture; AT&T was required to divest itself of its twenty-two Bell Operating Companies ("BOCs"). The BOCs provided the means by which local telephone service was furnished, Bell customers gained access to the network for both local and long distance telecommunications services through the BOCs. The Modified Final Judgment, however, imposed

certain business restrictions on the newly divested BOCs. Specifically, the BOCs were prohibited from providing inter-LATA services (which are long distance services involving calls that terminated outside the "local access and transport area" in which they originate, as defined in the Modified Final Judgment), or any non-telecommunications services, and from manufacturing telecommunications equipment. In addition, the Modified Final Judgment required the BOCs to provide all interexchange carriers (*i.e.*, long distance providers) with exchange access that was equal in type, quality and price to the access provided to AT&T. *United States v. AT&T*, 552 F. Supp. 131, 227 (D.D.C. 1982), *aff'd sub nom., Maryland v. United States*, 460 U.S. 1001, 103 S. Ct. 1240, 75 L.Ed.2d 472 (1983).

21. On January 1, 1984, divestiture of the Bell System by AT&T took effect. AT&T divested the seven Regional Bell Operating Companies ("RBOCs") and exited the local telephone business. The RBOCs were barred from providing long distance services. The seven RBOCs became known as the Baby Bells and included: Ameritech; SBC Communications; Pacific Telesis; Bell South; US West; Bell Atlantic; and NYNEX. SBC became the parent corporation of Southwestern Bell, and Pacific Telesis became the parent corporation of Pacific Bell and Nevada Bell. SBC and Pacific Telesis merged in early 1997. NYNEX and Bell Atlantic merged in mid-1997 and became known as Bell Atlantic Corporation. Bell Atlantic later merged with GTE Corporation and is now doing business as Verizon Communications, Inc.

22. Local telephone companies such as the Bell Operating Companies are commonly referred to as local exchange carriers ("LECs") and provide business and residential customers with local telephone and/or high speed internet services.

23. In addition to the Bell Operating Companies, there are hundreds of other local exchange carriers operating in the United States. These local exchange carriers generally offer the same services as the Bell Operating Companies. Al-

though GTE was not one of the original Bell Operating Companies, prior to merging with Bell Atlantic it acquired local telephone systems in 28 states and was one of the largest local phone companies in the nation in terms of telephone lines. Local exchange carriers historically operated in their local franchise areas free of competition, pursuant to exclusive franchises granted by state regulatory authorities.

24. A consent decree also was entered against GTE in 1984. *United States v. GTE Corp.*, 1985-1 Trade Cas. (CCH) § 66.355 (D.D.C. 1984) ("GTE Consent Decree"). The GTE Consent Decree was prompted by GTE's acquisition of one of the largest long-distance companies in the United States, and was based upon the same concerns underlying the AT&T consent decree with the United States. Under the GTE Consent Decree, operating companies (*i.e.*, the local exchange providers) were prohibited from providing long distance services, but GTE Corporation itself was permitted to provide long-distance services through other subsidiaries. GTE was required to maintain total separation between its long distance operations and the GTE operating companies, so that those companies could not use their position as exclusive local telephone service providers within their franchised areas to lessen competition in long distance services.

B. The Telecommunications Act of 1996

25. On February 8, 1996, the Telecommunications Act of 1996 became law when it was signed by President Clinton. Pub. L. No. 104, 110 Stat. 56. The Act amends the Communications Act of 1934. (See 47 U.S.C. § 609, Historical and Statutory Notes.) The Act changed the landscape of federal and state telecommunications regulatory policies and the telecommunications industry.

26. The Act adopts a pro-competitive framework for the telecommunications industry in the United States. It opens the markets for both local telephone and long-distance services to effective competition.

27. Because of their prior unique existence as government granted monopolies and the benefits that they enjoyed as government granted monopolies, the Act requires that the LECs, including Defendants, must provide potential competitors access and connections to their lines and equipment on just, reasonable and non-discriminatory terms.

28. The Act also requires the incumbent local exchange companies ("ILEC") to provide competitors with the same quality of service that the incumbent local exchange carriers provide to themselves or their own customers. The Act specifically defines an ILEC as follows: "With respect to an area, the local exchange carrier that on February 8, 1996, provided telephone exchange service in such area." 47 U.S.C. § 251. The seven original RBOCs, GTE and Defendants herein are ILECs.

29. With respect to long-distance service, the Act establishes a detailed mechanism for the RBOCs to compete for the first time in the long distance business. Unlike the RBOCs, GTE was allowed to expand into long-distance telephone service as soon as the Act became law on February 8, 1996.

30. Pursuant to the Act, before the respective RBOCs can offer long-distance telephone service, they must, *inter alia*, satisfy a 14-point checklist of requirements and demonstrate that there is competition in their respective local markets. It is up to the FCC in coordination with the Department of Justice and various state public utilities commissions to decide, upon request by an RBOC, when the RBOC has met the requirements.

31. Section 251 of the Act (47 U.S.C. § 251) imposes certain obligations on ILECs designed to permit new entrants to use some or all of the ILECs' networks to offer local-exchange services.

32. Section 251 of the Act requires an ILEC to: (1) allow a competitor to interconnect with its network so that the com-

petitor can provide calls to and from that network; (2) sell to competitors access to components of its network, called network elements, on an unbundled or individual basis; and (3) sell its retail telephone services to competitors at wholesale prices. All of these requirements of an ILEC are to be provided by the ILEC "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." *Id.* Section 251 imposes specific obligations on telecommunications carriers designed to promote competition in local exchange markets across the country. Federal Register/Vol. 61. No. 169, August 29, 1996, at 45476.

33. The Act directed the FCC to establish regulations to implement § 251's requirements within six months of its enactment. On August 8, 1996, the FCC released its Report and Order ("Report and Order").

34. The Report and Order promulgated "national rules and regulations implementing the statutory requirements of the Act intended to encourage the development of competition in local exchange and exchange access markets." Federal Register/Vol. 61. No. 169, August 29, 1996 at 45476.

35. GTE and the RBOCs appealed the Report and Order to the 8th Circuit, and on October 15, 1996, the 8th Circuit stayed the Report and Order, including its pricing rules and regulations, pending a decision on the merits. *Iowa Utils. Bd. v. FCC*, 109 F.3d 418 (8th Cir. 1996). The group defending the Report and Order included, among others, the FCC and the U.S. Department of Justice.

36. On July 18, 1997, the U.S. Court of Appeals for the Eighth Circuit filed its Opinion in the *Iowa Utilities Board v. FCC* case. *Iowa Utils. Bd.v. FCC*, 120 F.3d 753 (8th Cir. 1997). The Court vacated certain provisions of the FCC's Report and Order and upheld the remainder. Specifically, the Court stated: "We decline the petitioners' request to vacate the FCC's entire First Report and Order and limit our rejection of FCC rules only to those that we have specifically overturned in this opinion." *Id.* at 819. In a footnote, the

Court stated: "In total we vacate the following provisions: 47 C.F.R. §§ 51.303 51.305(a)(4) 51.311(c)-f 51.317 (vacated only to the extent this rule establishes a presumption that a network element must be unbundled if it is technically feasible to do so) 51.405 51.501-51.515 (inclusive except for 51.515 (b) 51.601-51.611 (inclusive) 51.701-51.717 (inclusive except for 51.701 51.703 51.709(b) 51.7119a0910 51.7159d0 and 51.717 but only as they apply to CMRS providers) 51.809 First Report and Order ¶¶ 101-103 121-128 180. We also vacate the proxy range for line ports used in the delivery of basic residential and business exchange services established in the FCC's Order on Reconsideration dated September 27 1996." *Id.*

C. <u>The RBOCs' Market Allocation and Refusal to Compete</u>

37. The 1996 Telecommunications Act authorized RBOCs to offer local telephone and/or high speed internet services in each other's territories, yet they have stayed almost completely out of one another's markets. Indeed, "[t]he major telephone companies have not sought to provide local telephone service outside of their home territories." Consumer Federation of America, *Lessons From 1996 Telecommunications Act: Deregulation Before Meaningful Competition Spells Consumer Disaster*, February 2001, p. 2. "Major incumbent service providers have failed to attack markets within their industry . . . [m]ajor incumbent service providers have failed to use their facilities to attack cross markets." *Id.* at 20.

38. "It was hoped that the large incumbent local monopoly companies (RBOCs) might attack their neighbors' service areas, as they are the best situated to do so. But such competition has not happened. The incumbent local exchange carriers (RBOCs) have simply not tried to enter each other's service territories in any significant way." Consumer Federation of America, *Lessons From 1996 Telecommunications Act: Deregulation Before Meaningful Competition Spells Consumer Disaster*, February 2001, p. 13.

39. Although the RBOCs contend that CLECs are hurting them by leasing network components at below-cost rates, the RBOCs have refrained from engaging in meaningful head-to-head competition in each other's markets. For example, "[i]n New York, SBC served a grand total of six residential lines at the end of 2001." Joan Campion, *Competition Is Vital For Phone Customers*, Chicago Tribune, Nov. 11, 2002, Commentary pg. 20.

40. The failure of the RBOCs to compete with one another would be anomalous in the absence of an agreement among the RBOCs not to compete with one another in view of the fact that in significant respects, the territories that they service are non-contiguous. As reflected in Exhibit A hereto, SBC serves most of the State of Connecticut even though Verizon rather than SBC serves the surrounding states. SBC serves California and Nevada, even though Qwest serves the other surrounding states. Similarly, there are many relatively small areas within the States of California, Texas, Illinois, Michigan, Ohio, Wisconsin, Indiana and other states that are served by Verizon, even though SBC serves all surrounding territories, as illustrated in Exhibit B hereto.[1] The failure of the RBOCs that serve the surrounding territories to make significant attempts to compete in the surrounded territories is strongly suggestive of conspiracy, since the service of such surrounded territories presents the RBOC serving surrounding territories with an especially attractive business opportunity that such RBOCs have not meaningfully pursued.

41. In competing for business in Connecticut, Verizon's predominance in the surrounding states would have provided it with substantial competitive advantages. In competing for

---

[1] On information and belief, all or substantially all of the small areas served by Verizon that are surrounded by territories served by other RBOCs, as illustrated in Exhibit B hereto, were acquired by Verizon not as the result of competition by it with other RBOCs since the time of enactment of the Telecommunications Act, but rather through acquisition of territories served by Verizon's corporate predecessors-in-interest who served those areas prior to that time.

business in California and Nevada, Qwest's predominance in surrounding states would have given it substantial competitive advantages. In competing for the business in the many smaller territories that Verizon serves that are surrounded by territories served by other RBOCs, the dominance of those other RBOCs in surrounding areas would have given them substantial competitive advantages. Nevertheless, Verizon has not sought to compete in a meaningful manner with SBC in Connecticut, Qwest has not sought to compete meaningfully with SBC in California and Nevada, and the RBOCs that serve the areas surrounding the smaller areas served by Verizon, as illustrated on Exhibit B hereto, have not sought to compete meaningfully with Verizon in those smaller areas. In the absence of an agreement not to compete, it is especially unlikely that there would have been no efforts by surrounding and dominant RBOCs to compete in such surrounded territories.

42. On October 31, 2002, Richard Notebaert the former Chief Executive Officer of Ameritech, who sold the company to Defendant SBC in 1999 and who currently serves as the Chief Executive Officer of Defendant Qwest, was quoted in a *Chicago Tribune* article as saying it would be fundamentally wrong to compete in the SBC/Ameritech territory, adding "it might be a good way to turn a quick dollar but that doesn't make it right." Jon Van, *Ameritech Customers Off Limits: Notebaert*, Chicago Tribune, Oct. 31, 2002 Business, pg. 1.

43. The pronouncement that Qwest would forgo lucrative opportunities in its sister monopoly markets and in its principal line of business came as Qwest announced a Third Quarter loss of $214 million and 13% fall in revenue.

44. On November 8, 2002, in response to Notebaert's remarks, the Illinois Coalition For Competitive Telecom called Notebaert's statement "evidence of potential collusion among regional Bell phone monopolies to not compete against one another and kill off potential competitors in local phone service." *Illinois CLECS Assail Notebaert*, State Telephone

Regulation Report, Comment, Vol. 20, No. 22. According to the article, "[t]he CLEC group said Notebaert indicated that the Bells' strategy was to divide the country into local phone 'fiefdoms,' not to compete against each other, and to devote their collective efforts to 'eliminating would-be competitors in local service.'" *Id.*

45. On December 18, 2002, United States Representatives John Conyers, Jr. of Michigan and Zoe Lofgren of California sent a letter to United States Attorney General John Ashcroft requesting that the U.S. Department of Justice, Antitrust Division investigate whether the RBOCs are violating the antitrust laws by carving up their market territories and deliberately refraining from competing with one another. Jon Van, *Lawmakers Seek Probe of Bells; Do Firms Agree Not To Compete*, Chicago Tribune, Dec. 19, 2002, Business, pg. 2; James S. Granelli, *Federal Probe of Baby Bells Urged; Comments By Chairman Of Qwest Raise Questions About The Competitive Zeal Of The Regional Phone Companies*, Los Angeles Times, Dec. 19, 2002, Business, Part 3, Pg. 3; *Conyers Asks Justice Dept. To Investigate Bells On Anticompetitive Practices*, Communications Daily, Dec. 20, 2002, Today's News. Representatives Conyers and Lofgren questioned the extent to which the RBOCs' "very apparent noncompetition policy in each others' markets is coordinated." Letter to The Honorable John D. Ashcroft dated December 18, 2002, p. 2.

46. The RBOCs do indeed communicate amongst themselves through a myriad of organizations, including but not limited to the United States Telecom Association, the Tele-Messaging Industry Association, the Alliance for Telecommunications Industry Solutions, Telecordia, Alliance for Public Technology, the Telecommunications Industry Association and the Progress and Freedom Foundation.

47. Defendants have engaged in parallel conduct in order to prevent competition in their respective local telephone and/or high speed internet services markets. "They have re-

fused to open their markets by dragging their feet in allowing competitors to interconnect, refusing to negotiate in good faith, litigating every nook and cranny of the law, and avoiding head-to-head competition like the plague." Consumer Federation of America, *Lessons From 1996 Telecommunications Act: Deregulation Before Meaningful Competition Spells Consumer Disaster*, February 2001, p. 1. Defendants also have engaged and continue to engage in unanimity of action by committing one or more of the following wrongful acts in furtherance of a common anticompetitive objective to prevent competition from Competitive Local Exchange Carriers ("CLECS") in the their respective local telephone and/or high speed internet services markets:

(a) Defendants have failed to provide the same quality of service to competitors that Defendants provided to their own retail customers;

(b) Defendants have failed to provide access to their operational support systems ("OSS"), including on-line customer service records ("CSRs"), on a nondiscriminatory basis that places competitors at parity. Moreover, competitors do not have access to unbundled elements on the same basis on which Defendants accessed the same elements;

(c) Defendants' competitors have experienced undue delays in the provisioning of unbundled elements. Such delays are discriminatory and preclude competitors from offering service as attractive to customers as Defendants' services and on a basis that places competitors at parity with a respective Defendant;

(d) Defendants have billed customers of competitors who are converted from Defendants' retail service. As a result of Defendants' practices, customers of competitors are double-billed. Defendants' practices have severely impacted competitors' relationships with customers;

(e) Defendants have failed to provide interconnection between the network and those of competitors that is equal in quality to the interconnection that each provided itself;

(f) Defendants have refused to sell to competitors, on just, reasonable, and non-discriminatory terms, access to components of the network on an unbundled or individual basis;

(g) Defendants have refused to sell to competitors local telephone and/or high speed internet services at wholesale prices that are just, reasonable and nondiscriminatory, thereby preventing Defendants' competitors from being able to competitively resell the services to Plaintiffs and members of the Class;

(h) Defendants have refused to allow competitors to connect to essential facilities, consisting of, but not limited to, local telephone lines, equipment, transmission and central switching stations (central office) and "local loop" on just, reasonable and non-discriminatory terms;

(i) Defendants have used discriminatory and error filled methods to bill local telephone service competitors in order to discourage competition by making it virtually impossible for competitors to audit the bills they received from Defendants;

(j) Defendants have imposed slow and inaccurate manual order processing causing competitors to devote significant time, effort and expense to identify and rectify problems to ensure that orders were ultimately processed correctly;

(k) Defendants have used monopoly power in their respective wholesale local telephone and/or high speed internet services market in order to gain or maintain a competitive advantage in the retail market for the provision of local telephone and/or high speed interact services; and

(l) Defendants have used their respective monopoly power and exclusive control over essential facilities consisting of, but not limited to, local telephone lines, equipment, transmission and central switching stations (central office) and "local loop" to negotiate agreements on unfair terms with competitors who were seeking access to their respective local telephone networks. Each Defendant, possessing the exclusive and sole source of entry into its own local telephone and/or high speed internet services market, was in a superior bargaining position to competitors and potential competitors and used that superior bargaining position to dictate unfair terms upon competitors.

48. The structure of the market for local telephone services is such as to make a market allocation agreement feasible, in that the four defendants, taken together, account for as much as ninety percent or more of the markets for local telephone services within the 48 contiguous states. Elaborate communications thus would not have been necessary in order to enable Defendants to agree to allocate territories and to refrain from competing with one another. A successful conspiracy among the Defendants to allocate territories would not require such frequent communications as to make prompt detection likely.

49. If one of the Defendants had broken ranks and commenced competition in another's territory the others would quickly have discovered that fact. The likely immediacy of such discovery makes a territorial allocation agreement among the Defendants more feasible, more readily enforceable, and more probable. In this respect as well, the structure of the market was conducive to an agreement among the Defendants to allocate territories to one another.

50. Had any one of the Defendants not sought to prevent CLECs (other than the other Defendants) from competing effectively within that Defendant's allocated territory in the ways described above, the resulting greater competitive inroads into that Defendant's territory would have revealed the

degree to which competitive entry by CLECs would have been successful in the other territories in the absence of such conduct. In addition, the greater success of any CLEC that made substantial competitive inroads into one Defendant's territory would have enhanced the likelihood that such a CLEC might present a competitive threat in other Defendants' territories as well. In these respects as well as others, Defendants had compelling common motivations to include in their unlawful horizontal agreement an agreement that each of them would engage in a course of concerted conduct calculated to prevent effective competition from CLECs in each of the allocated territories.

51. In the absence of any meaningful competition between the RBOCs in one another's markets, and in light of the parallel course of conduct that each engaged in to prevent competition from CLECs within their respective local telephone and/or high speed internet services markets and the other facts and market circumstances alleged above, Plaintiffs allege upon information and belief that Defendants have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another.

VI.

INTERSTATE TRADE AND COMMERCE

52. At times relevant herein, Defendants and/or their subsidiaries provided local and regional telephone and/or high speed internet services across state lines, and regularly and frequently solicited customers and sent bills and received payments via the mail throughout the United States. The marketing, sale and provision of local telephone and/or high speed internet services regularly occurs in and substantially affects interstate trade and commerce.

VII.

CLASS ACTION ALLEGATIONS

53. Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of the following class:

> All persons or entities who reside or resided in the continental United States (excluding Alaska and Hawaii) and are or were subscribers of local telephone and/or high speed internet services (the "Class") from February 8, 1996 to present (the "Class Period"). Excluded from the Class are the Defendants and any parent, subsidiary, corporate affiliate, officer, director or employee of a Defendant and any judge or magistrate judge assigned to entertain any portion of this case.

54. The members of the Class are so numerous and geographically dispersed that joinder of all members is impracticable. The exact number and identity of Class members is unknown to Plaintiffs but can readily be ascertained from books and records maintained by Defendants or their agents. Upon information and belief, there are millions of local telephone and/or high speed internet services subscribers in the United States who are within the defined Class.

55. There are questions of law or fact common to the Class members concerning:

(a) whether Defendants and their co-conspirators engaged in a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets by, among other things, agreeing not to compete with one another and otherwise allocating customers and markets to one another;

(b) the duration and extent of the contract, combination or conspiracy alleged herein;

(c) whether the Defendants were participants in the contract, combination or conspiracy alleged herein;

(d) whether the alleged contract, combination or conspiracy violated Section 1 of the Sherman Act, 15 U.S.C. § 1;

(e) whether the alleged contract, combination or conspiracy caused injury and damage to Plaintiffs and members of the Class and the appropriate measure of damages;

(f) whether a Defendant's conduct violated state antitrust laws;

(g) whether Plaintiffs and members of the Class are entitled to injunctive and other equitable relief; and

(h) whether Defendants and their co-conspirators fraudulently concealed the conspiracy alleged herein.

56. The claims of Plaintiffs are typical of the claims of each of the members of the Class. Plaintiffs and members of the Class purchased local telephone and/or high speed internet services from a Defendant or a competitor of a Defendant in the continental United States.

57. Plaintiffs will fairly and adequately protect the interests of the Class. There is no conflict of interest between Plaintiffs and other members of the Class and Plaintiffs are represented by experienced class action counsel.

58. Defendants have acted in an unlawful manner on grounds generally applicable to all members of the Class.

59. The questions of law or of fact common to the claims of the Class predominate over any questions affecting only individual class members, so that the certification of this case as a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

60. For these reasons, the proposed Class may be certified under Fed. R. Civ. P. 23.

VIII.

FRAUDULENT CONCEALMENT

61. Plaintiffs and members of the Class had no knowledge of the contract, combination or conspiracy or any facts alleged herein which might have led to the discovery thereof until shortly before the filing of this Complaint. Plaintiffs and members of the Class could not have discovered the contract, combination or conspiracy at an earlier date by the exercise of due diligence because of the affirmative, deceptive practices and techniques of secrecy employed by Defendants. Through these acts of secrecy and deception, which included affirmative acts to hide their wrongdoing, Defendants actively misled Plaintiffs and the Class about the existence and terms of their contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets by, among other things, agreeing not to compete with one another and to stifle attempts by others to compete with them and otherwise allocating customers and markets to one another.

COUNT I

Violation of Sherman Act § 1 – 15 U.S.C. § 1

62. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 61 as if fully set forth herein.

63. Defendants and their co-conspirators have engaged in a horizontal contract, combination or conspiracy in unreasonable restraint of trade in violation of Section 1 of the Sherman Act. 15 U.S.C. § 1.

64. Beginning at least as early as February 6, 1996, and continuing to the present, the exact dates being unknown to Plaintiffs, Defendants and their co-conspirators engaged in a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets by, among other things, agreeing not to compete with one another and to stifle attempts by oth-

ers to compete with them and otherwise allocating customers and markets to one another in violation of Section 1 of the Sherman Act. 15 U.S.C. § 1.

65. The contract, combination or conspiracy has had and will continue to have the following effects:

(a) competition in the local telephone and/or high speed internet services market has been unlawfully restrained, suppressed or eliminated;

(b) Plaintiffs and members of the Class have been denied the benefits of free, open and unrestricted competition in the local telephone and/or high speed internet services markets; and

(c) the price of local telephone and/or high speed internet services in the United States have been fixed, raised, maintained or stabilized at artificially high and non-competitive levels.

66. As a direct and proximate result of Defendants' unlawful conduct, Plaintiffs and members of the Class have suffered injury to their business or property and have paid supracompetitive prices for local telephone and/or high speed interact services.

67. If not permanently enjoined, the unlawful contract, combination or conspiracy will continue and cause irreparable harm to Plaintiffs and members of the Class who have no adequate remedy at law.

COUNT II

Violation of State Antitrust Laws

68. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 67 as if fully set forth herein.

69. As described above, Defendants have engaged in a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets by, among other things, agreeing

not to compete with one another and to stifle attempts by others to compete with them and otherwise allocating customers and markets to one another in violation of the following state antitrust laws.

70. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of Arizona Revised Stat. §§ 44-1401, *et seq.*

71. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of Cal. Bus. & Prof. Code §§ 16700, *et seq.*, and Cal. Bus, & Prof. Code §§ 17200.

72. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of violation of D.C. Code Ann. §§ 28-45031, *et seq.*

73. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of Fla. Stat. §§ 501. Part II, *et seq.*

74. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of Iowa Code §§ 553.4 *et seq.*

75. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of Kan. Stat. Ann. §§ 50-101, *et seq.*

76. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of La. Rev. Stat. §§ 51:137, *et seq.*

77. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of Me. Rev. Stat. Ann. 10, § 1101, *et seq.*

78. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of Mass. Ann. Laws ch. 93, *et seq.*

79. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of Mich. Comp. Laws Ann. §§ 445.771, *et seq.*

80. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of Minn. Stat. §§ 325D.52, *et seq.*

81. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of Miss. Code Ann. §§ 75-21-1, *et seq.*

82. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of Nev. Rev. Stat. Ann. § 598A, *et seq.*

83. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of New Jersey Consumer Fraud Act, N.J. Stat. Ann. §§ 56:8-1 *et seq.*

84. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of N.M. Stat. Ann. §§ 57-1-1 *et seq.*

85. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of New York General Business Law §§ 340, *et seq.* and § 349 *et seq.*

86. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of N.C. Gen. Stat. §§ 75-1, *et seq.*

87. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of N.D. Cent. Code § 51.08.1-01, *et seq.*

88. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of S.D. Codified Laws Ann. § 37-1, *et seq.*

89. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of Tenn. Code Ann. §§ 47-25-101, *et seq.*

90. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of Vt. Stat. Ann. 9, § 2453, *et seq.*

91. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of W.Va. Code §§ 47-18-1, *et seq.*

92. Defendants have unlawfully entered into a contract, combination or conspiracy in unreasonable restraint of trade in violation of Wis. Stat. § 133.01, *et seq.*

93. Plaintiffs and members of the Class have been injured in their business or property by reason of Defendants' anti-trust violations alleged in this Count. Their injury consists of paying higher prices for local telephone and/or high speed internet services than they would have paid in the absence of the violations alleged herein. This injury is of the type the antitrust laws of the above States and the District of Columbia were designed to prevent and flows from that which makes Defendants' conduct unlawful.

COUNT III

Unjust Enrichment

94. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 93 as if fully set forth herein.

95. Defendants have benefitted from their unlawful acts through the overpayments from Plaintiffs and other Class members and the increased profits resulting from such overpayments. It would be inequitable for Defendants to be permitted to retain the benefit of these overpayments, which were conferred by Plaintiffs and the other class members and retained by Defendants.

96. Plaintiffs and members of the Class are entitled to the establishment of a constructive trust consisting of the benefit

to Defendants of such overpayments, from which Plaintiffs and the other Class members may make claims on a pro-rata basis for restitution.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs and members of the Class pray that the Court enter judgment in their favor as follows:

A. Declaring this action to be a proper class action and certifying Plaintiffs as the representative of the Class pursuant to Rule 23 of the Federal Rules of Civil Procedure;

B. Declaring that Defendants violated and are in violation of the Sherman Act § 1 and the various state antitrust statutes alleged herein;

C. Awarding threefold the damages sustained by Plaintiffs and members of the Class as a result Defendants' violations;

D. Ordering injunctive relief preventing and restraining Defendants and all persons acting on their behalf from engaging in the unlawful acts alleged herein;

["E" omitted in original]

F. Awarding Plaintiffs and members of the Class the costs, expenses, and reasonable attorneys' fees and experts' fees for bringing and prosecuting this action; and

G. Awarding Plaintiffs and members of the Class such other and further relief as the Court may deem just and proper.

JURY DEMAND

Pursuant to Rule 38(h) of the Federal Rules of Civil Procedure, Plaintiffs hereby demand a jury trial on all issues so triable.

Dated: April 11, 2003
New York, New York

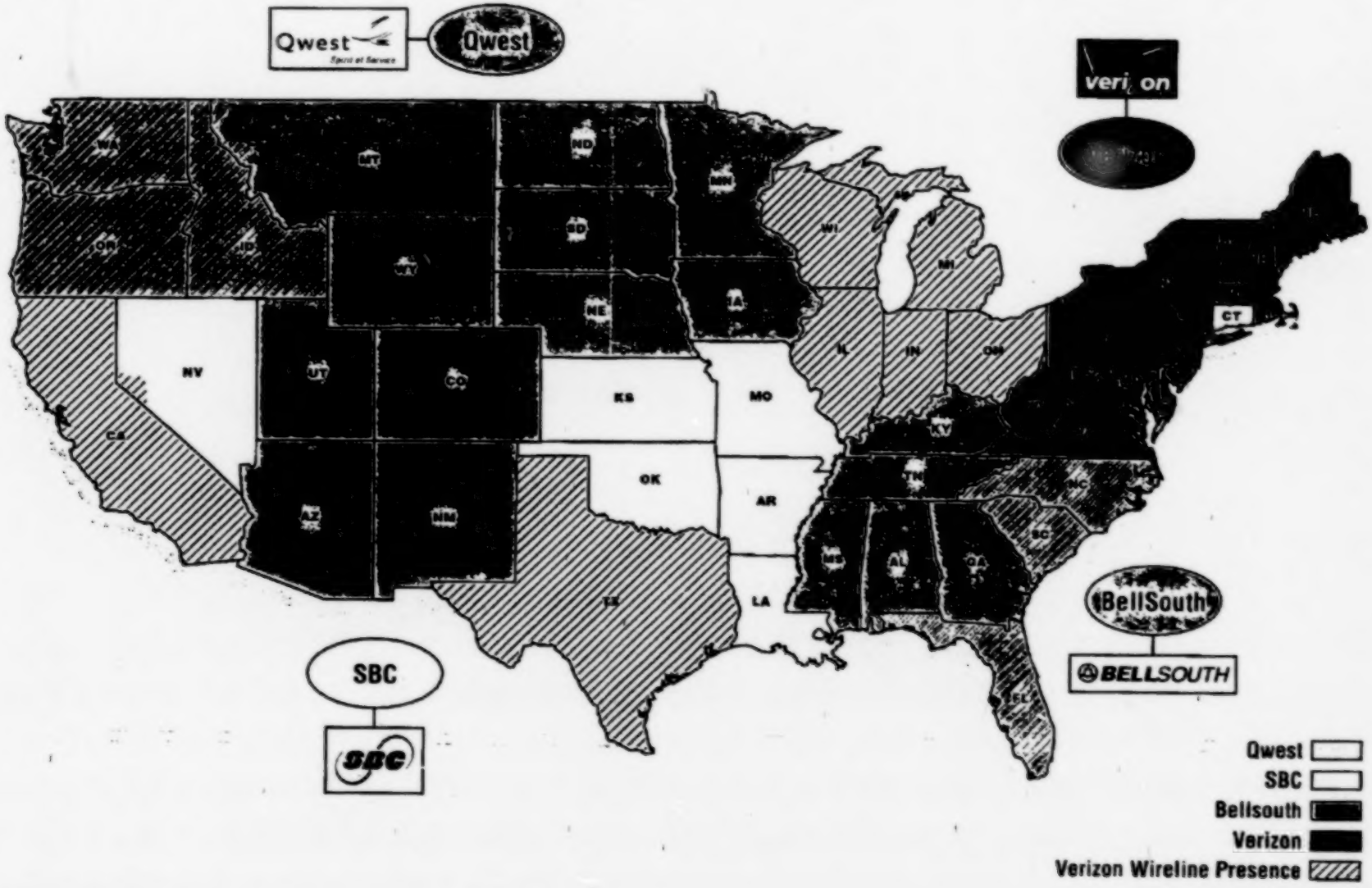
MILBERG WEISS BERSHAD HYNES & LERACH LLP

By: /s/ MICHAEL M. BUCHMAN
J. Douglas Richards (JDR-6038)
Michael M. Buchman (MB-1172)
Michael R. Reese (MR-3183)
One Pennsylvania Plaza
New York, New York 10119-0165
Telephone: (212) 594-5300
Facsimile: (212) 868-1229

SCHIFFRIN & BARROWAY, LLP
Richard S. Schiffrin
Joseph H. Meltzer
Edward W. Ciolko
Three Bala Plaza East
Suite 400
Bala Cynwyd, Pennsylvania 19004
Telephone: (610) 667-7706
Facsimile: (610) 667-7056

Attorneys for Plaintiffs,
William Twombly and Lawrence Marcus

RBOC Territories



Verizon Wireline Presence

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 02 CIV. 10220 (GEL)

WILLIAM TWOMBLY AND LAWRENCE MARCUS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

BELL ATLANTIC CORPORATION, BELLSOUTH CORPORATION, QWEST COMMUNICATIONS INTERNATIONAL INC., SBC COMMUNICATIONS INC., AND VERIZON COMMUNICATIONS INC.,
Defendants.

DECLARATION OF STEVEN G. BRADBURY

I, STEVEN G. BRADBURY, declare as follows:

I am a partner in the Washington, DC office of Kirkland & Ellis, and I am counsel to Verizon Communications, Inc. in this matter. I make this declaration in support of Defendants' Memorandum of Law in Support of Defendants' Motion to Dismiss ("Memorandum"). I have personal knowledge of the matters set forth herein. I am admitted *pro hac vice* in the Southern District of New York for the purposes of this matter. I attest that attached as exhibits to this Declaration are true and correct copies of the following documents referenced in Defendants' Memorandum:

* * * * *

(d) Exhibit D: Jon Van, *Ameritech Customers Off Limits: Notebaert*, Chicago Tribune (Oct. 31, 2002);

(e) Exhibit E: Jon Van, *Lawmakers Seek Probe of Bells*, Chicago Tribune (Dec. 19, 2002);

(f) Exhibit F: Letter from Representative Conyers and Lofgren to Attorney General Ashcroft (Dec. 18, 2002)

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 8, 2003.

/s/ STEVEN G. BRADBURY
Steven G. Bradbury (SB-5618)
(admitted *pro hac*)
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
T: (202) 879-5000
F: (202) 879-5200

EXHIBIT D

Citation Search Result Rank(R) 1 of 1 Database
10/31/02 CHICAGOTR 1 ALLNEWS
10/31/02 Chi. Trib. 1
2002 WL 102285888

(Publication page references are not available for this document.)

Chicago Tribune

Copyright 2002, Chicago Tribune. All Rights Reserved.

Thursday, October 31, 2002

Business

Ameritech customers off limits: Notebaert

By Jon Van, Tribune staff reporter.

Even though his company could use a new revenue stream, Richard Notebaert said Wednesday that he would not consider competing against his old firm for phone customers in the Chicago area.

Notebaert, the former Ameritech chief executive who now heads Qwest Communications International Inc. in Denver, said it would be fundamentally wrong to compete for Ameritech's residential customers even though Qwest could profit from the service.

"It might be a good way to turn a quick dollar," Notebaert said, "but that doesn't make it right."

Notebaert's firm reported a third-quarter loss of $214 million, or 13 cents a share, on Wednesday. Revenues fell 13 percent, to $3.8 billion from $4.37 billion a year earlier. Notebaert, who ran Ameritech until he sold it to San Antonio-based SBC Communications Inc. three years ago, took the reins at financially troubled Qwest this summer.

Under its old management, Qwest attracted attention of federal authorities for questionable accounting practices and is in the process of restating earlier financial results.

But despite the financial problems, Notebaert said he does not see expanding into new markets as a good idea. AT&T Corp. and the MCI unit of WorldCom Inc. have entered the residential market in Illinois and other Midwestern Ameritech states and have attracted thousands of new customers.

Executives at Ameritech's parent, SBC, have mounted a full-scale campaign against requirements that they sell AT&T, MCI and other rivals network service at wholesale prices.

The rivals use Ameritech's lines through a process referred to as an unbundled network element platform.

Notebaert, whose firm is the dominant local phone Bell carrier in 14 western states, stood shoulder-to-shoulder with SBC in opposing competition that uses UNE-platform wholesale rates.

"I don't think it's a sustainable economic model," Notebaert said. "It's just a nuts pricing model."

Notebaert noted that Qwest does compete to provide data and long-distance service to large Chicago-based businesses, but it said it will not offer local phone service to small businesses or residential customers.

Qwest is missing a good chance to boost revenues, said Phil Jacobson, general partner at Network Conceptions, a research and consulting firm based in Vienna, Va.

"It's an excellent opportunity for Qwest," said Jacobson, "but that could change."

The Federal Communications Commission is studying current wholesale pricing policies and will likely adjust them, he said. A company would be wise to wait until that happens before making a move, he said.

While the FCC may alter wholesale pricing rules, it is still committed to promoting competition among phone compa-

nies, said Bill Capraro Jr., president of Cimco Communications Inc., an Oakbrook Terrace-based firm that supplies communications services to businesses.

Capraro, who is a board member of an industry association representing Bell rivals, recently met with members of the FCC and has agreed to prepare a study for the federal agency that will summarize the competitors' views on how wholesale pricing could be modified.

"The FCC commissioners aren't influenced by the massive campaigning and rhetoric in the media and from lobbyists for SBC and the other Bells," said Capraro. "I came away from meeting with the FCC saying these individuals are fair, they're looking at all sides, and they're trying to help our industry and the economy."

Capraro said that Notebaert's refusal to consider using UNE platform rates to compete against another Bell company isn't surprising.

"The Bells aren't serious about competing, especially against each other," he said.

EXHIBIT E

Citation Search Result Rank(R) 1 of 1 Database
12/19/02 CHICAGOTR 2 ALLNEWS
12/19/02 Chi. Trib. 2
2002 WL 104498329
(Publication page references are not available for this document.)

Chicago Tribune

Copyright 2002, Chicago Tribune. All Rights Reserved.

Thursday, December 19, 2002

Business

Lawmakers seek probe of Bells
Do firms agree not to compete?

By Jon Van, Tribune staff reporter.

An antitrust inquiry into the lack of competition among Baby Bells for local phone customers was requested Wednesday by two members of the House Judiciary Committee.

The request to U.S. Atty. Gen. John Ashcroft cited statements reported last month in a Tribune story that Denver-based Qwest Communications International Inc. has no intention of competing for local phone service customers in Chicago or other parts of the old Ameritech territory.

Richard Notebaert, Qwest's chief executive, said that he is philosophically opposed to federal requirements that incumbent local carriers provide cut-rate wholesale service to their competitors. Notebaert also said that he thinks the requirements for unbundled network element Platform wholesale service will be revised next year, making it unwise to base a business plan on it.

Some competitive phone carriers viewed Notebaert's remarks as an admission of what has been a largely unspoken agreement that Qwest, SBC Communications Inc., Verizon

Communications Inc. and BellSouth Corp. won't compete vigorously in each other's territory.

Wednesday's letter to Ashcroft from Reps. John Conyers Jr. (D-Mich.) and Zoe Lofgren (D-Calif.) said "no one would challenge that the Bells collude extensively in their efforts to get Congress and regulators to undo market access laws" and suggests that cooperation among the giant local phone carriers may extend beyond lobbying.

"We request . . . an immediate inquiry into these non-compete practices to determine whether any illegal arrangement exists that would explain why the Bell monopolies, who claim they are falling on hard times, elect not to pursue a lucrative avenue for their shareholders," the letter concludes.

Even though many people have suggested the Bells have a tacit non-compete agreement with one another, making such a legal case would be very difficult, said Jim Speta, an assistant law professor at Northwestern University who specializes in telecommunications.

"The Bells are each others' most natural competitors, and some people are quite frustrated that they aren't competing with one another," Speta said. "To make an antitrust case, you'd want to find evidence of an agreement not to compete.

"Absent that, you'd have to establish the companies are behaving in a way that makes no economic sense unless they had a secret agreement not to compete. You'd have to show they were purposely leaving money on the table.

"These are very hard cases to put together and prove."

EXHIBIT F

[Committee members' names omitted]

[Committee members' names omitted]

ONE HUNDRED SEVENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY
2138 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6216
(202) 225-3951
http://www.house.gov/judiciary

December 18, 2002

The Honorable John D. Ashcroft
Attorney General of the United States
U.S. Department of Justice
10th Street and Constitution Avenue, NW
Washington, DC 20530

Dear Mr. Attorney General:

As you know, one of the principal purposes of the 1996 Telecommunications Act ("1996 Act") was to spur competition in the telecommunications industry.[1] Congress voted, on an overwhelmingly bipartisan basis, to replace outdated regulations with market-oriented competition rules.

As part of the policy of promoting competition, the 1996 Act specifically authorized the Regional Bell Operating Companies – who then possessed, and now possess, monopoly control of local telecommunications markets – to compete for local telecommunications services outside their region where they could take advantage of the Act's provisions

---

[1] *See generally*, Telecommunications Act of 1996, Pub.L.No. 104-104, 110 Stat 56 (1996) (1996 Act), 47 U.S.C. § 251.

that give them market access to the incumbent's facilities.[2] Indeed, Congress enacted the 1996 Act, giving the Bells the ability to access lucrative long distance markets from which they had been prohibited,[3] relying, in part, on public pledges that they would seek to advance the goals of competition by entering local telecommunications markets outside their region.[4]

It is in this context that we are troubled by the public declaration of the Chief Executive Officer of Qwest, Richard Notebaert, that it would be fundamentally wrong to compete in the territory of SBC/Ameritech noting that it "might be a good way to turn a quick dollar but that doesn't make it right."[5] Interestingly, this pronouncement that Qwest would forgo lucrative opportunities in its sister monopoly markets and in its principal line of business, came as Qwest an-

---

[2] *See* 47 U.S.C. §§ 271(b)(2) & 271 (j).

[3] *See* H.R. Rep. No. 104-458, 104th Congress, 2d Sess. 1 (1996). The long distance restriction was also known as the "inter-LATA" restriction. This is because the Modified Final Judgment (MFJ) created 197 local access and transport areas or "LATAs," representing areas across which the Bells are not permitted to offer telecommunications services. For example, under the MFJ, Michigan Bell (Ameritech) could not complete a call from Detroit to Lansing since it would cross a LATA; instead Michigan Bell was required to hand off the call to a long distance company who completed the call for the consumer. (LATAs are not synonymous with area codes.)

[4] "*Summary of SBC/Ameritech Conditions*," para. IV, 21, www.fcc.gov/bureaus/common_carrier/news_releases/1999/nrc9077a.txt ("Within 30 months from the merger closing, SBC/Ameritech will enter at least 30 major markets outside its region as a facilities-based competitive provider of local services to business and residential customers. SBC/Ameritech is liable for voluntary incentive payments of nearly $1.2 billion dollars if it misses the entry requirements in all 30 markets.")

[5] "*Ameritech Customers Off Limits: Notebaert*," Jon Van, Chicago Tribune (Oct. 31, 2002).

nounced a 3rd quarter loss of $214 million and 13% fall in revenue, to $3.8 billion from $4.37 billion a year earlier.

In our view, this public pronouncement seems to suggest the need for scrutiny by the Antitrust Division. As you are well aware, the Sherman Act proscribes, with criminal and civil penalties, agreements to divide market territories.[7] A long line of cases holds that any such agreement would be a *per se* violation of the Sherman Act.[8]

No one would challenge the assertion that the Bells collude extensively in their efforts to get Congress and regulators to undo market access laws. In near choreographed unison they bemoan the laws that require them to open their monopoly facilities to competition. It is less clear, however, to what extent their very apparent non-competition policy in each others' markets is coordinated. While collusion by the Bells on legislative or regulatory matters is permitted under the antitrust laws, any arrangement to carve up market territories would not be permitted under antitrust law.

It is imperative, in our view, that the Justice Department closely examine whether the coordinated market behavior on the part of the Bells justifies the dismissal of their non-compete policy as merely "conscious parallelism." In doing such an analysis, we note that, in *Milgram v. Loew's Inc.*,[9] the Third Circuit held that "uniformity in policy forms the basis of an inference of joint action" and that when a firm

---

[6] "*FCC Ensures Bell Atlantic Compliance with Terms of Long Distance Approval; Bell Atlantic Agrees to Pay Up to $27 Million*," FCC News (March 9, 2000).

[7] 15 U.S.C. § 1.

[8] *See U.S. v. Topco Associates, Inc.*, 405 U.S. 596, 92 S. Ct. 1126, 1131 L.Ed.2d 515 (1972) (holding that market divisions utilizing retail licensing is *per se* illegal); *General Leaseways Inc. v. National Truck Leasing Ass'n*, 744 F.2d 588 (7th Cir., 1984).

[9] 192 F.2d 579 (3rd Cir., 1951).

"acted in apparent contradiction of its own self interest [t]his strengthens considerably the inference of conspiracy."[10]

Indeed, the courts have held that seemingly coordinated and irrational policies or practices that carve up markets with anticompetitive effects warrant scrutiny,[11] and that seemingly casual agreements that produce anticompetitive effects may run afoul of the antitrust laws.[12]

Therefore, we request that you open an immediate inquiry into these non-compete practices to determine whether any illegal arrangement exists that would explain why the Bell monopolies, who claim they are falling on hard times, elect not to pursue a lucrative avenue for their shareholders.

Sincerely,

/s/ John Conyers
Ranking Member

/s/ Zoe Lofgren
Member of Congress

cc: Honorable F. James Sensenbrenner, Jr.

---

[10] *Id.* at 583; *see also Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939).

[11] *Boise Cascade Corp. v. Federal Trade Commission*, 637 F.2d 573 (9th Cir., 1980).

[12] *United States v. Container Corp. of Am.*, 393 U.S. 333 (1969); *American Column & Lumber Co., v. United States*, 257 U.S. 377 (1921); *United States v. American Linseed Oil*, 262 U.S. 37 (1923).

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 02 CIV. 10220 (GEL)

WILLIAM TWOMBLY AND LAWRENCE MARCUS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

BELL ATLANTIC CORPORATION, BELLSOUTH CORPORATION, QWEST COMMUNICATIONS INTERNATIONAL INC., SBC COMMUNICATIONS INC., AND VERIZON COMMUNICATIONS INC.,
Defendants.

AFFIDAVIT OF MICHAEL M. BUCHMAN

MICHAEL M. BUCHMAN, an attorney, being duly sworn deposes and says as follows:

1. I am a member of Milberg Weiss Bershad Hynes & Lerach LLP. I am duly admitted to the bars of the states of New York and Connecticut. I am also a member of this Court. I submit this Affidavit in further support of Plaintiffs' Memorandum of Law In Opposition To Defendants' Joint Motion To Dismiss and Plaintiffs' Memorandum Of Law In Opposition To BellSouth's Motion To Dismiss For Lack Of Personal Jurisdiction And Improper Venue.

A. Plaintiffs' Memorandum of Law In Opposition To Defendants' Joint Motion To Dismiss

2. Annexed hereto as Exhibit A is a true and correct copy of 148 Cong. Rec. H. 574, 590-592 (Feb. 27, 2002) (statement of Ms. Kilpatrick).

3. Annexed hereto as Exhibit B is a true and correct copy of James Sensenbrenner and House Judiciary Comm., 107th Cong., *Internet Freedom and Broadband Deployment Act of 2001 For 8 Pt. Head If More Than 3 Lines Adverse Report*, H.R. Doc. No. 107-83 Prt. 2.

4. Annexed hereto as Exhibit C is a true and correct copy of Charles Nolter, *Taking the Local*, 28 The Deal 9, June 2, 2003, at 22.

5. Annexed hereto as Exhibit D is a true and correct copy of Jon Van, *Ameritech Customers Off Limits: Notebaert*, Chicago Tribune, October 31, 2002.

6. Annexed hereto as Exhibit E is a true and correct copy of the Decision of the Connecticut Department of Public Utility Control Commission, Docket No. 95-03-01, *Application of the Southern New England Telephone Company For Financial Review And Proposed Framework For Alternative Regulation*, dated Mar. 13, 1996.

7. Annexed hereto as Exhibit F is a true and correct copy of the Opinion and Order of the New York Public Serv. Comm'n, Opinion No. 96-13, *Proceeding on Motion of the Commission to Examine Issues Related to the Continuing Provision of Universal Service and to Develop a Regulatory Framework for the Transition to Competition in the Local Exchange Market*, dated May 22, 1996.

8. Annexed hereto as Exhibit G is a true and correct copy of the Rulemaking Order of the Pennsylvania Public Utility Commission, Docket No. L-00940095, *Rulemaking Re Updating and Revising Existing Filing Requirement Regulations 52 Pa. Code §§ 53.52-53.53 – Telecommunications Utilities*, dated June 2, 2000.

9. Annexed hereto as Exhibit H is a true and correct copy of the Application Requirements For Requesting Certification to Provide Competitive Local Exchange Services ob-

tained from the Public Service Commission of Wisconsin available at: http://psc.wi.gov.telecom/LECresel/lecapp.htm.

10. Annexed hereto as Exhibit I is a true and correct copy of the Order Concerning Motion For Reconsideration in the Matter of Local Exchange and Local Exchange Access Telecommunications Competition before the North Carolina Public Utilities Commission, Docket No. P-100, Sub 133, dated November 29, 2000.

B. Plaintiffs' Memorandum Of Law In Opposition To BellSouth's Motion To Dismiss For Lack Of Personal Jurisdiction And Improper Venue

11. Annexed hereto as Exhibit J is a true and correct copy of *Daily Briefing*, Atl. J. & Const., Dec. 14, 2001, at 2G.

12. Annexed hereto as Exhibit K is a true and correct copy of BellSouth Corp., *Prospectus Supplement* (Oct. 22, 2001), *available at* http://www.sec.gov/edgar.shtml.

13. Annexed hereto as Exhibit L is a true and correct copy of an Order of the New York Public Serv. Comm'n, Case 96-C1183, *Petition of Bell South Long Distance Inc. for a Certificate of Public Convenience and Necessity to Resell All Forms of Telephone Service in New York*, dated Apr. 7, 1997.

14. Annexed hereto as Exhibit M is a true and correct copy of a list of BellSouth subsidiaries as of December 31, 2002, BellSouth Corp. Form 10-K filed with the Securities and Exchange Commission on February 28, 2003.

15. Annexed hereto as Exhibit N is a true and correct copy of Entity Information Sheets, NYS Dept. of State Div. of Corps.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: June 20, 2003
New York, New York

/s/ MICHAEL M. BUCHMAN
Michael M. Buchman

[Notary Omitted]

EXHIBIT A

Congressional Record – House
Wednesday, February 27, 2002
107th Congress, 2nd Session
148 Cong. Rec. H574

[*H574]

* * * * *

The SPEAKER pro tempore (Mr. SIMPSON). Pursuant to House Resolution 350 and rule XVIII, the Chair declares the House in the Committee of the Whole House on the State of the Union for the consideration of the bill, H.R. 1542.

The Chair designates the gentleman from Texas (Mr. BONILLA) as chairman of the Committee of the Whole, and requests the gentleman from Illinois (Mr. LAHOOD) to assume the chair temporarily.

[*H575] IN THE COMMITTEE OF THE WHOLE

Accordingly, the House resolved itself into the Committee of the Whole House on the State of the Union for the consideration of the bill (H.R. 1542) to deregulate the Internet and high speed data services, and for other purposes, with Mr. LAHOOD (Chairman pro tempore) in the chair.

* * * * *

[*H590]

* * * * *

Ms. KILPATRICK. Mr. Chairman, today I rise in opposition to H.R. 1542, the Tauzin-Dingell Broadband legislation. I am simply not confident that this bill provides adequate protection to consumers. I have watched, over the years, while as a nation, we have boldly made our way down the road of deregulation. We deregulated the Savings and Loan

Industry and watched them implode under the weight of their own largess. We saw the same with both the Airlines Industry and the former AT&T and Bell behemoths. In all of those [*H591] cases the consumer paid the price through increased fees, tax subsidies and decreased services.

Now, given the choice to either regulate cable and satellite or deregulate the Baby Bells, who we know to have a history of bad behavior, we are urged to deregulate the bad actors. In my eyes, the underlying legislation before the House represents a choice to deregulate the bad actors.

Without amendment, the underlying bill would limit State and Federal regulation of the pipeline we know as the Internet to an antitrust suit against the Bell Companies. This Mr. and Mrs. America is no choice. This bill gives consumers, who are my constituents and the people that I care about most, no protection if prices are unjustly increased and no protection for failing service quality.

Internet Service Providers oppose the measure because it would subject them to the unrestrained will of the Baby Bells.

Small Innovative Telecommunications Companies oppose the measure because it will force them out of the market.

Thirty-one Public Utility Commissions, including Michigan's oppose this bill.

The National Governors Association opposes this bill.

The National League of Cities opposes Tauzin-Dingell.

The Council of State Governments opposes Tauzin-Dingell.

Most Consumers Groups oppose this bill because it will lead to price increases and inept service.

Mr. Chairman, as you can see there is strong opposition to this measure. Again, I am not confident that any amendment

can fix this bill and protect the consumers of Michigan's 15th district. So I will oppose this measure on final passage.

Mr. EVANS. Mr. Chairman, I rise in opposition to H.R. 1542, the Internet Freedom and Broadband Deployment Act. I believe it will harm competition within the telecommunications industry and reduce oversight of this growing and important sector of our economy, resulting in less service and choice for all Americans.

Broadband internet access is rapidly becoming a necessity for individuals and communities trying to keep up with trends in education and economic development. The internet is a tremendous resource for information, communication, and commerce. Understandably, individuals living in communities without access to broadband are frustrated by their inability to take full advantage of all the internet has to offer.

H.R. 1542 is the Bell Companies' proposed solution to the so-called "digital divide." They claim onerous regulations established by the Telecommunications Act of 1996 have prevented them from deploying broadband to underserved communities. Actually, the 1996 Act merely required the Bell Companies to meet a 14 point competitive checklist before offering long-distance service in their home markets. The promise of lucrative long-distance markets was to serve as an incentive for the Bell Companies to open their markets to competitors.

By exempting Bell Companies who wish to offer broadband services from competitive requirements, H.R. 1542 essentially guts all of the competitive elements of the 1996 Act. Bell Companies will no longer have to guarantee network access to upstart telecommunications companies who have provided consumers with alternatives. Additionally, the bill will make it impossible for the FCC and states to regulate costs and customer service standards, which could send prices skyrocketing and leave consumers with no recourse for substandard service. Given our recent experiences with de-

regulation of essential consumer services, it seems foolish to believe that further deregulation of the telecommunications industry is the answer for rural America.

Over the past few years, the Bell Companies have developed a shockingly poor record of customer service. In order to spur competition, the 1996 Act requires the Bell Companies to allow Competitive Local Exchange Carriers (CLECs) access to their lines when consumers choose to do business with CLECs rather than a Bell. The Bells frequently refuse to comply with these requests in a timely manner. Since 1996, Bell Companies have paid over $2 billion in fines. They clearly believe it is to their advantage to pay penalties for violations of the 1996 Act rather than open their markets. Instead of taking steps to aggressively enforce the 1996 Act, Congress has proposed a bill that would eliminate the FCC's and states' ability to regulate costs and protect consumers.

There is no reason to believe that passing H.R. 1542 will speed broadband deployment to rural America. The fact is, the Bell Companies have chosen not to provide even basic services in many of the rural communities they claim will be helped by H.R. 1542. Since they are only required to upgrade infrastructure for communities they already serve, many rural consumers are left out entirely. Another problem is that the broadband service requirement only applies to consumers that live within three miles of a Bell Company central station. Those living outside of a three mile radius are given no guarantees of broadband access at all. Again, rural America is being left out.

As for being shut out of the broadband market, the numbers speak otherwise. BellSouth tripled its DSL customer base in 2001. SBC, Verizon, and Qwest have similarly built and maintained a network of broadband customers. A large majority of Americans already have access to broadband, but very few have chosen to subscribe because of the cost. The FCC has concluded that broadband is being deployed in a

reasonable and timely manner. HR 1542 is not about offering broadband services. It is about eliminating competition and oversight in the telecommunications industry for the Bell Companies.

The list of organizations opposing HR 1542 grows longer every day. The Public Utility Commissions of 31 states, AARP, the Gray Panthers, Consumers Union, the Consumer Federation of America, Americans for Tax Reform, Citizens Against Government Waste, and the National Retail Federation have all opposed the bill. HR 1542 will not speed the delivery of broadband to rural America but it will undermine consumer rights nationwide. Americans deserve better.

* * * * *

EXHIBIT B

107TH CONGRESS REPT. 107-83
HOUSE OF REPRESENTATIVES
1st Session Part 2

INTERNET FREEDOM AND BROADBAND DEPLOYMENT ACT OF 2001

June 18, 2001. – Ordered to be printed

MR. SENSENBRENNER, from the Committee on the Judiciary, submitted the following

ADVERSE REPORT

together with

ADDITIONAL AND DISSENTING VIEWS

[To accompany H.R. 1542]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1542) to deregulate the Internet and high speed data services, and for other purposes, having considered the same, reports unfavorably thereon with amendments and recommends that the amendments be agreed to and that the bill do not pass.

* * * * *

[69]

ADDITIONAL VIEWS

We concur with the Committee's views and strongly endorse the Committee's unfavorable recommendation of H.R.

1542. To our knowledge, the Committee's last adverse report on a telecommunications-related bill was over twenty years ago on H.R. 6121,[1] the "Telecommunications Act of 1980," which would have severely undermined the Government's antitrust litigation that was then pending against AT&T, and which would have lifted critical portions of the 1956 judicial consent decree against AT&T. Now, as in 1980, this Committee must vigorously protect against legislation designed to benefit monopolists, impede competition, and hurt consumers. In 1980, the Committee's adverse report stopped H.R. 6121 dead in its tracks, and we envision history repeating itself here. No stronger message could have been sent to the House – H.R. 1542 is bad policy and bad for the people of the United States.

In its current form, H.R. 1542 destroys the bargain made in the Telecommunications Act of 1996 (the "1996 Act") by permitting the Bells to provide long distance data services before meeting the competitive checklist in section 271 of the 1996 Act. In doing so, the bill also eliminates the Attorney General's historic role in identifying anti-competitive behavior by the Bell companies. We support the Sensenbrenner Amendment because it restores the Attorney General's role by requiring the Bells to demonstrate that they have opened their local telephone monopoly to competition before they can offer long distance data services.[2] In effect, the market

---

[1] H.R. 6121, the "Telecommunications Act of 1980," H.Rept. 96-1252, pt. 2, 96th Cong. 2d Sess. (Oct. 8, 1980) (adversely reporting H.R. 6121 out of the Committee on the Judiciary).

[2] Under both Democratic and Republican leadership, this Committee has always voted on an overwhelmingly bipartisan basis to preserve the Department of Justice's role in ensuring that the telecommunications marketplace is open to competitors. We must not forget that it was the Department of Justice that brought the antitrust suit that ultimately broke up the old "Ma Bell" system. The Department of Justice, through Republican and Democratic Administrations alike, has applied its antitrust and telecommunications industry expertise to these markets, to foster competition and deter and redress anti-competitive activity. In 1996, when we

opening requirements of section 271 of the 1996 Act which were taken out of H.R. 1542, were re-imposed by the Sensenbrenner Amendment.

However, the Judiciary Committee's referral on H.R. 1542 was extremely limited, relating only to provisions that "propose(d) to narrow the purview of the Attorney General under section 271 of the Communications Act of 1934."[3] As a result, the Committee was unable to amend section 4 of the bill – arguably the most offensive portion of the bill.

We take this opportunity to put into context the historic role that the Judiciary Committee has played in ensuring that antitrust considerations are taken into account when setting telecommunications policy. We also expand on the two most egregious portions [70] of H.R. 1542 that were deemed to be outside the Committee's referral. First, section 4 of H.R. 1542 rolls back key portions of the 1996 Act regarding unbundling and line sharing, which likely will have a negative impact on competition in the telecommunications industry. Second, section 4 completely deregulates high speed data services offered by the Bell operating companies, which would deregulate two areas over which the Committee has repeatedly exercised jurisdiction: "spamming" and law enforcement in telecommunications. We therefore strongly oppose H.R. 1542 and urge the House, based upon our adverse recommendation, not to consider this bill.

I. HISTORICAL BACKGROUND

From the late 19th century until the historic 1982 antitrust consent decree was entered, the American Telephone & Telegraph Company ("AT&T") dominated the American telecommunications market. The government made several

---

considered the Telecommunications Act, the Committee voted overwhelmingly to give the Department of Justice a co-equal role with the FCC to review the Bell monopolies' entry into both voice and data long distance service.

[3] Cong. Rec. H2709, (daily ed. May 24, 2001).

efforts to control AT&T's monopoly power – a Department of Justice antitrust suit brought in 1913, the passage of the Communications Act of 1934, and a second Department of Justice antitrust suit brought in 1949. None of these efforts succeeded in opening the telecommunications market to effective competition.

Because AT&T continued to take advantage of its monopoly power to the detriment of consumers, DOJ brought a third antitrust action against AT&T in 1974. In the 1974 case brought by Republican Attorney General William Saxbe, the government sought, in part, to prevent AT&T from using its local telephone monopoly to discriminate against its competitors in long distance and equipment manufacturing and to use revenues from its regulated monopoly in local telephone service to subsidize its other non-regulated business ventures, a practice known as cross-subsidization. That action led to a settlement and consent decree entered in 1982 during the Reagan Administration.[4] This consent decree is commonly known as the Modification of Final Judgment or the "MFJ."

Under the terms of the MFJ, AT&T retained its long distance and manufacturing businesses, but divested itself of its local telephone exchange monopoly. Effective January 1, 1984, the local telephone exchange monopolies were taken over by seven regional Bell operating companies ("RBOCs") – NYNEX, Bell Atlantic, BellSouth, Ameritech, SBC Communications, Inc. (formerly known as Southwestern Bell), U.S. West, and Pacific Telesis.

The MFJ required an RBOC to demonstrate that there was "no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter"[5] before it could enter four lines of business: (1) providing long distance service; (2) manufacturing or providing communica-

---

[4] *United States* v. *American Telephone and Telegraph Co.*, 552 F. Supp. 131 (D.D.C. 1982) *aff'd*, 460 U.S. 1001 (1983)

[5] AT&T, 522 F. Supp. at 231.

tions equipment and manufacturing customer premises equipment; (3) providing information services; and (4) entering into any other non-telecommunications [71] business. The courts subsequently removed the restrictions on information services and non-telecommunications businesses.[6]

In the years following the MFJ, the long distance industry became highly competitive with the entrance of numerous companies offering consumers greater choices and lower prices. In contrast, the RBOCs resisted opening their networks to competitive providers of local telecommunications services, despite some Federal and State regulatory initiatives to require them to do so. As a result, the local telephone exchange market remained under monopoly control by the RBOCs.

The impetus for 1996 Act arose from the application and effect of the MFJ. The MFJ prevented the RBOCs from entering the long distance business because of their monopoly control over the local exchange. Congress structured the 1996 Act to offer the RBOCs a basic trade: the RBOCs were to open their exchanges to local competitors and, in return, they were to be allowed entry into the long distance market. The 1996 Act sought to accomplish this largely by two interrelated provisions. The first is section 251, which empowers the FCC to impose access and interconnection obligations on Incumbent Local Exchange Carriers ("ILECs," the largest of which were the RBOCs and GTE, before GTE merged with Bell Atlantic to form Verizon) to ensure competition in local exchange and exchange access carriers.[7]

---

[6] *United States* v. *Western Electric Co.*, 767 F. Supp. 308, 327 32 (D.D.C. 1991) (removing information services bar), *aff'd*, 993 F. 2d 1572 (D.C. Cir.), *cert. denied*, 114 S. Ct. 487 (1993); *United States* v. *Western Electric Co.*, 673 F. Supp. 525, 602-03 (D.D.C. 1987) (removing non-telecommunications business bar), *aff'd in relevant part*, 900 F. 2d 283 (D.C. Cir.), *cert. denied*, 498 911 (1990).

[7] Upon passage of the 1996 Act, section 251 was immediately tied up in litigation. Not until January 1999 – nearly three years after enactment

The second "pro-competitive" provision of the 1996 Act is section 271, which presents the formal test by which the RBOCs can obtain authority to provide in-region long distance service. Elements of the test include: (1) compliance with a competitive checklist based in significant part on section 251's interconnection and unbundling requirements, which is designed to assure that the RBOC local exchange market is open to competition;[8] (2) existence of a "facilities based" competitor, or in the absence of such a competitor, a State-approved statement of generally available terms to interconnection and access;[9] (3) compliance with a separate affiliate requirement and non-discrimination safeguards described in section 272 of the Act;[10] and (4) a finding by the FCC that authorization is consistent with the "public interest, convenience and necessity." The 1996 Act requires the FCC to give "substantial [72] weight" to the Department of Justice's opinion in the ultimate determination regarding Bell entry.[11]

When the 1996 Act was enacted, many observers predicted that the RBOCs would quickly comply with the competitive

---

of the 1996 Act – did the U.S. Supreme Court rule that the FCC had the authority to prescribe crucial rules to implement section 251. *Iowa Utilities Board* v. *FCC*, 119 S. Ct. 721 (1999). Still pending before the Supreme Court is a separate challenge to the FCC's principles for pricing interconnection and network elements. *Verizon Communications, Inc., et al.* v. *FCC, et al.*, 219 F.3d 744 (8th Cir. 2000), *cert. granted*, Jan. 22, 2001. The uncertainty resulting from these lawsuits has delayed implementation of the market-opening requirements of the 1996 Act. Adding further to this delay and uncertainty, the RBOCs also challenged the constitutionality of section 271 as an unlawful bill of attainder, despite their support for the legislation at the time of enactment. These challenges were unsuccessful. *SBC Communications, Inc.* v. *FCC*, 154 F.3d 226 (5th Cir. 1998); *BellSouth Corp.* v. *FCC*, 162 F.3d 678 (D.C. Cir. 1998).

[8] See sections 271(c)(2)(B), 271(d)(3)(a)(ii).

[9] See sections 271(c)(1)(A) and (B).

[10] See section 271(d)(3)(b).

[11] *Id.*

checklist so that they could begin competing in long distance. The RBOCs also indicated that they planned to enter the cable television business. Observers also believed that the long distance companies would be able to obtain the interconnection and access to the incumbents' network elements necessary for the provision of local service. As for the cable companies, most observers hoped that some or all of them would enter the telephone business, and that they would face substantial competition in the cable business from satellite companies and telephone companies. Unfortunately, these developments largely have not come to pass.

Believing in the promise of the 1996 Act, companies who compete with the Bells to provide broadband service, called competitive local exchange carriers ("CLECs"), invested tens of billions of dollars, created 100,000 jobs, and began the enormously difficult work of providing choice to consumers and businesses. But today, most of those companies have been devastated by the anti-competitive behavior and procrastination of the Bell monopolies. Tens of thousands of newly created jobs disappeared, billions of dollars of value are gone, many CLECs are bankrupt, and the capital markets are nearly closed to many of the competitors.

The limited development of competition in the past five years is not an indication that the 1996 Act has failed. We continue to believe that the principles and procedures embodied in that statute, properly implemented and enforced, offer a foundation for a competitive telecommunications marketplace. Rather, what the past five years have shown is that legislating the removal of the legal barriers to entry does not by itself bring competition into being. Instead of seeing the RBOCs eager to enter each others' businesses, there has been a general reluctance to compete. While the RBOCs could have entered the long distance business by opening their local markets, they have largely chosen not to do so.

Consumer groups and CLECs have seen the Bells slow to open up their networks to competition, as is evidenced by the fact that more than 90% of long distance calls still go through some component of the Bells' network. While innovation has flourished and prices have been slashed in the area of long distance, the reverse has occurred in the local network. In addition, in the past five years, we have seen unprecedented industry consolidation. Instead of seven RBOCs and GTE, we now have only four: Verizon, BellSouth, SBC, and Qwest. This consolidation has also reduced the prospects for competition.

Now, some want to bring the same competition problems we have seen in the local loop to the broadband market. Broadband is the critical condition to bringing the promise of the Internet home to millions of American consumers and businesses through streaming audio and video and other high end uses. The last thing we need to do is bring the same high prices, shoddy service and stifling of [73] innovation we have seen in the local telephone market to the high speed Internet market.

II. SECTION 4 OF H.R. 1542 SEVERELY HARMS COMPETITION BY ROLLING BACK THE UNBUNDLING AND LINE-SHARING REQUIREMENTS OF SECTION 251 AND BY PREEMPTING FCC AND STATE REGULATIONS

The Sensenbrenner Amendment greatly improved H.R. 1542 by restoring the Attorney General's role in the section 271 application process, thereby ensuring that the RBOCs open their networks to competition before being permitted to offer long distance data services. Unfortunately, due to the Committee's narrow referral on H.R. 1542, we were unable to address section 4 of the bill, which contains some of the most anti-competitive provisions.

First and foremost, the Sensenbrenner Amendment could not fix the portions of the bill that roll back the line-sharing

and unbundling requirements contained in section 251 of the 1996 Act. Even as amended, H.R. 1542 would allow the Bells to continue to act as monopolists and abuse their power by denying competitors access to the local loop.

Second, the amendment could not correct the fact that H.R. 1542 would severely limit Federal and State authority to prevent "spamming" over high speed Internet services and to ensure that law enforcement officials with proper authorization are able to conduct electronic surveillance effectively and efficiently in the face of rapid advances in telecommunications technology. The remainder of this section discusses these problematic portions of H.R. 1542 that were unamendable due to the referral, yet clearly fall within the Committee's jurisdiction.

H.R. 1542 Eviscerates the Market-Opening Requirements of Section 251 of the 1996 Act

The Committee was unable to amend some of the most offensive portions of H.R. 1542 that dismantle the market-opening requirements of section 251 of the 1996 Act. section 251's "unbundling" and "line-sharing" requirements are the principal bases upon which many competitors (predominantly CLECs) are currently able to provide voice and data services that compete with the local phone companies (ILECs). H.R. 1542 undermines the unbundling and line-sharing requirements so severely that it could effectively kill off competition.

"Unbundling" is the requirement that the ILECs make the components of their networks available to competitors at cost-based prices. "Unbundled network elements" (or "UNEs") are the piece-part elements of the local phone network. They include the "local loop" that runs from people's homes to the ILEC's central office and the "trunk" that leads from the central office to the long distance phone network. Under the unbundling requirements of section 251, companies can lease the UNEs from the ILECs and use them in

conjunction with facilities they own and deploy in order to provide competitive voice and data services. A CLEC also has the right under section 251 to "co-locate" its own equipment in the ILEC's central office.

Section 4(b) of H.R. 1542 rolls back the FCC's unbundling rules, depriving new entrants of access to the facilities (the UNEs) they [74] need to compete. Specifically, CLECs would no longer be able to lease various network elements available under current FCC rules to provide high speed data service. Under H.R. 1542, the only way that a company could provide such service would be to build an extensive network from scratch. No new entrant – not even a company that plans eventually to operate its own network – can be expected to build out that network before signing up a single customer. MCI and Sprint began as resellers of AT&T, building up a customer base and market credibility that enabled them to make the investments in their own networks. Local competition in high speed data services can develop the same way, but CLECs must have the same opportunities provided to the original long distance competitors.

Furthermore, section 4(b) could have an extremely harmful effect on competition for voice services as well as data services. This is because section 4(b) exempts the ILECs from providing the network elements used to provide high-speed data services. Network elements are often facilities (i.e. the loop and trunk) that are used for both voice and data services. It is impossible to distinguish between voice and data traffic, since they are both increasingly transmitted in digital form that consists of "ones" and "zeros." Almost every CLEC provides both voice and data services to their customers over the same facilities. If the CLEC cannot obtain a network element because that network element is used for data service, the inability to obtain that network element is almost certain to limit the CLEC's ability to provide voice services as well.

H.R. 1542 also places severe limitations on the "line-sharing" rules adapted by the FCC pursuant to section 251 of the 1996 Act. "Line-sharing" is the unbundling of the high frequency portion of the local loop used to provide high speed data service. CLECs lease this portion of the loop to provide digital subscriber line ("DSL") service to customers in competition with the ILECs. Line-sharing makes it much more convenient and much more economical for residential customers to get DSL. The FCC ordered the ILECs to allow competitors to line-share in November 1999. Since that time, residential DSL competition has exploded, with both the ILECs and competitors providing line-shared DSL.

To the extent that the lines between people's homes and the ILECs' central offices are all copper, competitors can access the high frequency portion of the loop at the central office. Recently, ILECs have begun to replace some of the copper lines with fiber-optic lines.[12] The lines that are closest to people's homes are still made of copper. The place where the fiber ends and the copper begins is referred to as a "remote terminal."[13]

When fiber is "pushed out" to remote terminals in neighborhoods, competitors must be able to locate their own DSL equipment in the remote terminals in order to provide DSL service, or they must be able to get access to their subscribers' data traffic in the central office. The FCC and several States have ruled that competitors must [75] have access to remote terminals in order to continue to provide their DSL service.

---

[12] This yields benefits for consumers (faster, more available DSL service) and for the phone company (lower maintenance costs).

[13] The remote terminal is a piece of equipment that multiplexes the signals from several copper loops onto the fiber optic line. Currently, 35% of American homes are served by remote terminals with a mixed fiber/copper architecture, and this number is expected to grow rapidly, as the ILECs expand their plans to upgrade their facilities.

H.R. 1542 would overturn these FCC and State decisions and make it more difficult for consumers to obtain high-speed service from competitors. H.R. 1542 would preclude line-sharing for customers that are served by hybrid copper/fiber loop facilities and remote terminals.[14] This would deny competitors the ability to serve those customers, who will remain captive to the ILECs, a monopolist provider, for voice and data service.

H.R. 1542 Preempts FCC and State Regulations that Govern the Internet

Section 4(a) of H.R. 1542 may be construed to completely deregulate high speed data services offered by the RBOCs.[15]

---

[14] Although the ILECs claim that it is technically infeasible to line-share over a mixed copper/fiber architecture, this is simply untrue. Competitors can access fiber networks by interconnecting their equipment with the ILECs' facilities in the central office where the fiber loops terminate. Competitors can also interconnect with fiber facilities at the remote terminals, where the copper lines meet up with the fiber. There are no technical impediments to these interconnections and, in fact, this is the same way that the Bells offer their own broadband services. Even Qwest Communications has recognized that competitors need access to loops in order to provide broadband service. See Comments of Qwest Communications at 3, *Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Second Further Notice of Proposed Rulemaking; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Fifth Notice of Proposed Rulemaking* (filed Feb. 27, 2001). And Verizon has stated that an architecture of fiber and copper could be offered to competitive carriers. See Letter from Gordon R. Evans, Vice President, Federal Regulatory Affairs, Verizon, to Dorothy Attwood, Chief, Common Carrier Bureau, FCC, Apr. 26, 2001, at 2, filed May 1, 2001 in connection with *Bell Atlantic/GTE Merger Order*, CC Docket No. 98-184.

[15] Section 4(a) provides that "[e]xcept to the extent that high speed data service, Internet backbone service, and Internet access service are expressly referred to in [the Communications] Act, neither the Commission, nor any State, shall have authority to regulate the rates, charges, terms, or conditions for, or entry into the provision of, any high speed data service, Internet backbone service, or Internet access service, or to regulate any

As a result, a wide range of current consumer protection and other requirements may not apply to broadband services.[16] The Committee's narrow referral on H.R. 1542 prevented us from addressing our concerns in two areas that fall squarely within the Committee's jurisdiction: "spamming" and the Communications Assistance for Law Enforcement Act ("CALEA").

Unsolicited commercial electronic mail, or "spam," can impose significant economic burdens on Internet access services, businesses, and other recipients because of the finite volume of email that recipients can handle. This issue has recently been addressed by the Judiciary Committee. On May 23, 2001, the Committee marked up H.R. 718, the "Unsolicited Commercial Electronic Mail Act of 2001" to regulate the distribution of unsolicited commercial electronic mail messages. Yet despite the government's interest in protecting recipients from spam, section 4(a) of H.R. 1542 may severely restrict Federal efforts to regulate spam transmitted using the RBOCs' high speed data services.

Similarly, Congress enacted CALEA in 1994 to ensure that law enforcement officials with proper authorization are able to conduct electronic surveillance effectively and efficiently in the face of rapid advances in telecommunications technology. Section 4 of H.R. 1542 [76] deregulates technologies that are used to provide high speed data services. These are the very technologies that Congress and this Committee intended CALEA to cover. Section 4 threatens the government's authority to implement and enforce CALEA, and therefore, also threatens the ability of law enforcement offi-

---

network element to the extent it is used in the provision of any such service."

[16] These include subscriber privacy, foreign government ownership of telecommunications facilities, "slamming," obscene or harassing telephone calls, and services for hearing-impaired and speech-impaired individuals.

cials to conduct electronic surveillance of communications transmitted using high speed data services.

CONCLUSION

Competition should be our credo in telecommunications. It is the touchstone for lower prices, better services, and for unleashing the innovative creativity that has built our new economy from the ground up. And historically, it has been the role of this Committee to preserve those basic rules of competition. Unfortunately, the limited referral given to the Committee prevented us from amending or improving section 4 of H.R. 1542, which raises serious antitrust concerns that in any other context would be within the Committee's jurisdiction and will be in the future.

JOHN CONYERS, JR.
CHRIS CANNON
JERROLD NADLER
DARRELL E. ISSA

* * * * *

EXHIBIT C

Chris Nolter

Taking the Local

The Deal, June 2, 2003, at 22

Former broadband provider Broadwing Inc. last week reverted to its previous name, Cincinnati Bell Inc. While that may be the most visible change at the company, the telecom has undertaken a complex restructuring in the last six months.

Broadwing embarked on the effort in late October, a month after CEO Kevin Mooney's appointment.

"There were two issues," Mooney explains. "There was strategic overhang from being in the broadband business, and there was also financial overhang."

The first step was to renegotiate the 2003 and 2004 credit facility payment schedules. To get the lenders to give some ground, Broadwing agreed to a higher interest rate and a prepayment. Goldman, Sachs & Co.'s merchant banking unit arranged a $350 million issue of notes to help the company raise funds; the firm holds $250 million of the notes.

"If you looked underneath it all, this is a terrific company. It's very profitable. It has terrific management," says Muneer Satter, a managing director in Goldman's merchant banking group. "From that perspective it was a relatively easy decision to make. The issue was really getting the bank debt refinanced and getting the company on firmer ground."

Broadwing is also selling the assets of its cash-burning Broadwing Communications Services broadband unit to the buyout vehicle CIII Communications LLC for $129 million in cash. Announced in February, the deal is expected to close early in the third quarter.

Unlike some recent telecom transactions, the broadband sale wasn't routed through bankruptcy court, though Broadwing did consider putting the unit into Chapter 11. The company took the precaution of obtaining a waiver from Oak Hill Capital Partners LP, which has debt that could have been accelerated by a subsidiary filing.

Broadwing didn't file the subsidiary in part because it didn't want to tarnish its money-making local and wireless businesses. The company also wanted to preserve its right to apply $2.1 billion in net operating losses to future taxes, which could result in more that $800 million in tax savings over the next eight to nine years.

To facilitate the asset sale, the telecom also exchanged two series of notes that were issued by the subsidiary's predecessor, IXC Communications Inc., before its $3.2 billion merger with Cincinnati Bell in 1999.

"I don't know how we could have made it more complicated," Mooney says of the many interlocking negotiations.

Lehman Brothers Inc. and Banc of America Securities LLC have advised Broadwing, with Lehman leading the sale and BOA heading the bank amendment.

"I think it's going better than expected," Cannon Carr of CISC World Markets Corp. says of Broadwing's restructuring, though he notes the company still has a funding gap in 2006.

Carr and others have suggested that Broadwing could sell its wireless business. The company plans to address the 2006 obligations through its cash flow and another trip to the capital markets.

"To the degree they can generate $200 million a year in free cash flow, if they can do that, by 2006 they'll be in pretty good position," observes Will Power of Robert W. Baird & Co.

"We've got three full years to refinance $800 million of a $2.5 billion debt structure," Mooney says. "That is not at all an overwhelming task."

The Broadwing chief recently told The Deal's Chris Nolter more about the company's plans.

The Deal: One of the next milestones in the restructuring is the closing of the broadband sale. When will that happen?

Kevin Mooney: We have been saying the M&A deal will close in the third quarter. It could be earlier.

We have to get each state to approve the license transfer and the business transfer. There are 47 states. They are perfunctory filings, but there's a lot of bureaucracy involved.

What additional steps do you see taking?

Two steps. We believe that we can generate somewhere in the neighborhood of $200 million to $250 million free cash flow per year for debt reduction. We've been saying north of $200 million.

Every time we have an earnings release, we show the total cash flow. The total company is cash-flow positive. We show what the [cash] use was in the broadband business and then what the continuing business' positive cash flow was. We've been doing about $65 million to $70 million a quarter.

Once we put the new credit facility in place, the interest rate goes up. That's why we're in the $200 million-plus range.

We'll also be in the capital markets long before 2006 for the sole purpose of retiring the credit facility.

The credit facility is still a larger portion of our capital structure than we would like. We will probably be in either the high-yield market or the convert market within the next 12 months in a substantial way to start taking a big bite out of that 2006 refinancing.

How receptive are the capital markets?

I can only tell you that I believe we have access to the high-yield market today. The market is fairly strong. Liquidity is returning. There have been a number of deals that have been priced in the neighborhood that we would find acceptable in related industries. I don't think anything is imminent. I'd like to finish our restructuring before we get back into the capital markets.

The investment banks are calling constantly when anything prices. There have been a couple of pricings of high yield issuances that are not in our industry and a few that have been. There have been a number of converts. The convertible market is red hot right now.

There had been speculation that you might also sell the wireless unit.

Factually, first, we don't have to sell that. We don't have to make any more dispositions once we dispose of the Broadwing Communications business. It really becomes elective on our part if someone is willing to pay what we consider good value for our shareholders. I don't see that happening in this market today.

We have a 20% partner in AT&T Wireless and they do a right of first refusal on any transaction. My view right now is we're doing great with what we have.

So you are not shopping wireless?

We are not. It is certainly not needed.

For a long time there has been talk about the need for telecom consolidation, both in long haul and wireless. What's the outlook from your perspective?

In the long haul, I would start off by saying I don't see anyone entering that business who isn't in it today.

I just feel that the [incumbent local exchange carriers] don't believe they have to buy it, that they can win it in the marketplace.

I also feel that they don't want to start a cross-border war. If ILEC A buys long-haul company B, then ILEC B is going to have to go after that.

I think they feel that they have won the battle. They have beaten back the [competitive local exchange carriers]. They have beaten [interexchange carriers, or long-distance companies]. Why would they want to start a cross-border battle?

Within the industry, I see the consolidation happening in the second tier, like Level 3's acquisition of Genuity.

There was some stuff [said because] Broadwing Communications was bought by a new entry. Many people in the industry were disappointed by that because they wanted one less network out there.

What's holding up deals?

Truthfully, the synergies are there. If someone in the network business buys another network, they can have very good economies of scale running just one combined network. They only need one set of assets, one set of support staff, one sales channel, one management channel, one network operations channel.

The problem is they don't have any access to capital to effect a transaction. That's one of the biggest issues to date. In the long-haul market, there is just a very limited amount of capital available.

They could do stock. I don't know that the sellers really find the currency acceptable.

I don't see long haul consolidating soon. I think it's more likely in the wireless space.

Some people think the first wireless deal might be better for the industry than the parties involved. When do you see wireless consolidation happening?

I honestly thought we would have seen it already, and that it hasn't happened makes me cautious about when it will happen.

I don't see anybody taking it on the chin for the industry. In the Sarbanes-Oxley world, they're going to have to be motivated by what's best for their shareholder base first. Maybe those two intersect and they're one and the same. When it happens, I don't see big premiums, either.

What is the impact of all the Chapter 11 restructurings we've seen in telecom?

It keeps another competitor alive longer. I think that's what it does. The financial markets have written the assets down almost to zero to begin with. So from a stock valuation point, it's not like the long-haul networks have a lot of value.

The only question is, Do these reconstituted companies act rationally or not in the marketplace?

I have the sense that there is more likelihood that they will act rationally than not. The frothy valuations of the equity markets that caused people to do crazy things like swaps and price cuts to get market share – that payoff just isn't there.

When you come out of bankruptcy, typically you're more hindered that when you went in. CLECs are a great example of that.

The company considered a Chapter 11 filing for the broadband unit but didn't go that route.

We prefer to continue the option we have. It clearly gives us ownership of the NOLs, where there's some risk that bankruptcy might cloud that.

We have a very solid, stable [local exchange carrier] and wireless business. We don't want to damage the value of those businesses, and at the same time that $2.1 billion in NOLs is a very valuable asset. The reason they have value is that our profitable business can use them.

How did the Goldman notes fit into the overall reconstructing?

This was critical. The banks already had a very senior position in the capital structure. We knew that we needed to negotiate an extension of maturities in 2003 and 2004 with the banks.

Clearly yield alone wasn't going to get it done, so we had to offer a prepayment as well. To source that prepayment we needed some capital at a time when the capital markets were absolutely closed, especially to telecoms.

Goldman saw the value of the local franchise and the continuing business. It could see through the restructuring and so they made an offer that they would put in $350 million, the majority of which is their own money. It was contingent on getting the bank amendment completed. We brought that money in and that was really the first [step] that could facilitate our entire restructuring. That closed in March.

When you look at the Broadwing restructuring in the big picture, what is your debt-in-Ebitda target?

We will be at $2.5 billion in debt and $500 million in Ebitda. Five is where we will come out. We would like to retire $200 million to $250 million in debt a year for the next several years.

With some growth in Ebitda and the reduction of debt, we get down into that 4 range pretty darn quickly, which means improving credit quality. Two years from when we close, we'll be in the 4 range. I expect to close in the third quarter.

The local businesses are generating north of $200 million free cash flow already. This will not require unforeseen growth; this is business as usual. It is separating the cash-consuming business from the cash-producing business.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 02 CIV. 10220 (GEL)

WILLIAM TWOMBLY,
Plaintiff,

v.

BELL ATLANTIC CORPORATION, ET AL.,
Defendants.

New York, N.Y.
August 1, 2003
2:30pm

Before:

HON. GERLAND E. LYNCH, District Judge

APPEARANCES

MILBERG, WEISS, BERSHAD, HYNES & LERACH, L.L.P.
Attorneys for plaintiff
BY: J. DOUGLAS RICHARDS
MICHAEL BUCHMAN

KIRKLAND & ELLIS
Attorneys for defendant
BY: STEVEN G. BRADBURY

MAYER, BROWN, ROWE & MAW
Attorneys for defendant
BY: HECTOR GONZALES
RICHARD J. FAVRETTO

KELLOGG, HUBER, HANSEN, TODD & EVANS, PLLC
Attorneys for defendant
BY: MICHAEL K. KELLOGG
MARK HANSEN

[2]

PILLSBURY WINTHROP LLP
Attorneys for defendant
BY: MARIA T. GALENO

WILMER CUTLER & PICKERING
Attorneys for defendant
BY: PETER VIGELAND
WILLIAM KOLASKY
ANJAN SAHNI

[3]

(Case called)

THE COURT: This is all very exciting. Generally when I have oral argument on motions I spend most of the time on the questions that I have, and it may be that the parties have come with presentations to make just like they do in the Court of Appeals, with real lawyers and real judges. I am happy to do that, although if we are going to have some formal presentations, maybe I should have some idea how long people intend to speak and who intends to speak, just so that we can keep some control over the proceedings. Mr. Hansen?

MR. HANSEN: Good afternoon, your Honor. Mark Hansen for SBC, and I will be speaking on the motion. We have no presentation.

MR. RICHARDS: I will be addressing the joint motion of the defendants. My partner Mr. Buchman will address the personal jurisdiction motion of Bell South.

It is my habit to come with a presentation, but I always believe I should answer the court's questions first, so I am happy to start there.

THE COURT: Maybe I will start, since it is the defendants' motion, by hearing from Mr. Hansen briefly and raising some of the issues that I had.

MR. HANSEN: Thank you, your Honor. For us, we believe the motion is a fairly simple proposition. It has two legs. We believe the conspiracy count doesn't state a [4] conspiracy claim and the filed rate doctrine precludes plaintiffs' claims. On the conspiracy, I would like to read the allegation so it is clear. It is paragraph 451 of the amended complaint. It says, in the absence of any meaningful competition between RBOC in one another's markets and in light of the parallel course of conduct that each engaged in to prevent competition from the local exchange carriers within their respective local telephone and/or high-speed Internet services markets and the other facts and circumstances alleged above, plaintiffs allege upon information and belief that defendants have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed Internet services markets and have agreed not to compete with one another and otherwise allocate customers' markets to one another's.

That's it. We have no direct allegation of what human beings ever met. This happened in 1996 when there were seven of us. No allegation of when people met, no allegation of what they agreed upon, if anything, no allegation of a mechanism. We are left with a classic bare-bones allegation of conspiracy which the Second Circuit in the Heart Disease Research Foundation concluded is a purely dismissable conclusory allegation of conspiracy. In Heart Disease Research, Judge Feinberg was faced with a conspiracy that said American Motors, General Motors, Ford and GM all conspired to prevent the [5] development of a non-polluting car and the courts court [*sic*] said that doesn't state a claim, goodbye.

We think that is the case here, your Honor, and we think it is simple as that. In fairness, as a direct allegation it is as

simple as that, but we do have to move on to the second part of the argument.

THE COURT: Before we get there, this is the kind of argument that I always have trouble getting a handle on, because on the one hand we have the general principle that the Swerkowitz case is in my view just a continuation of a long-standing principle. I don't think it changes the law, I think it's what it always was, that we have notice pleading, and maybe footnoting to that also that it's very unlikely that plaintiffs in cases like this ever are able to allege when and where and how the meetings took place that may have formed an agreement in secret.

So that, you know, the argument that plaintiffs have to give that kind of chapter and verse seems to fly in the face of the general rule that plaintiffs don't have to plead their evidence or all of the facts that give rise to the claim.

Set against that, it is of course very easy to make charges in that very general form, and one is of course sympathetic – and I think this is where the decisions that you cite draw their power. One is sympathetic to the idea that defendants shouldn't be dragged into court simply by somebody [6] saying something in order to generate a fishing expedition, to check it out and see whether it might turn out to be true or not. Where does one draw the line in this regard?

You know, a lot of the things that you say in your brief suggest that, well, they don't tell us where the meeting was and they don't set out a whole microeconomic theory as to why this, that and the other thing might be true. That is the sort of thing that you don't see in complaints of any kind. That would be evidentiary matter. So what is it that you can say?

MR. HANSEN: Your Honor, I think you are right, Swerkowitz does not state law. Nonetheless, the law is that you have a short statement of facts entitling you to relief. That Verizon and Bellsouth entered into a conspiracy is a conclusion of law, not a statement of fact.

THE COURT: It is a conclusion of fact, isn't it? I see every day young people who are less exalted than your clients called into court because the government says that they conspired to deal in narcotics. You can have a whole trial, and at the end of the trial we still don't know when, where or whether they ever sat down and made some agreement. We have a lot of facts that show that people are connected to each other and a particular bad outcome, and we let the jury decide whether they are guilty or not. Nobody is ever called to the level of detail of pleading that you are suggesting.

[7] MR. HANSEN: Your Honor, I wouldn't want to digress into the pleading rules for a criminal case, the bill of particulars and the role that plays. I would note in civil cases, based on Rule 8 and 12, and the substantive rules of the antitrust laws and I think it is reasonably well stated in the Hartford and Swerkowitz case, the fact that people conspired, that is not a statement of facts, it is a legal conclusion. On the other hand, evidence does not need to be pleaded. So if the plaintiff has a basis for alleging that on a particular date at a particular place particular individuals agreed among themselves to divide the their [*sic*] markets, that would be a basis to move forward on a conspiracy claim.

Your Honor, of course it is true that people always make the argument, how do we know unless we get into people's – I don't mean to be flip. That is the last refuge of a pleading scoundrel. They can't come and say I've got a suspicion, let me root around in files and I may have something.

But, your Honor, the antitrust laws, not the pleading rules, have come up with standards that address the very concern that you raise, or that I believe you raise. That is this. All right, say plaintiffs don't have direct evidence of meetings and so on. Is that the only way one could state a conspiracy claim? Of course not.

I was moving to the second part of the antitrust law, [8] which says the following, and I believe this has been faithfully followed by the Second Circuit as recently as a few

weeks ago. If the plaintiff is in possession of facts that permit the plaintiff to allege a direct case, that is, people met and agreed, you can still base a conspiracy claim on parallel conduct by identified economic actors, but because that is such a potentially broad and sweeping rule and because parallel conduct is by itself indeed expected of economic actors, because they all have the same information and the same motives – we expect them to parallel each other – the courts have said, using the Pollit Krasner [*sic*] standard, you have facts, not speculation and not conclusions of law, that tend to show that the allegedly conspiratorial actions resulted from some sort of agreement and not merely from independent parallel conduct by firms acting in their own self-interest, quoting from Pollit Kasner [*sic*].

So let us go to the plaintiffs' complaint and see if there are facts alleged that this court, at the outset of a massive antitrust case – Associated General Contractors remains the law after Swerkowitz. Now I direct you to what they say gives them a ticket. They say it is in paragraphs 37 through 41 of their amended complaint, and I think it is very important that we hew closely to those paragraphs, because I believe I can show your Honor that even in the regime where we accept everything Swerkowitz says, there still are not facts [9] pleaded by the plaintiffs in this case that permit the inference that the entirely expected and rational conduct of our clients not to do a new business they never before have done, is entirely rational and innocent, and they don't plead any facts that would permit you to draw a contrary inference.

Without belaboring it, let's go through the paragraphs quickly.

THE COURT: Let me try and summarize it in the way that seems most appealing to me, and then maybe that will expedite the response. It seems to me that the argument is, none of these entities – and I realize there is a footnote as to whether it's none – have ever, and there is a footnote as to whether it's ever – have competed in each other's markets. If

that pattern showed up, absent the peculiar history of this industry I think one would think it a peculiar pattern indeed if you had companies in the same line of business that had regional territories, particularly if those territories didn't have some natural contiguous quality to it but you have people sort of checkerboarding the country, and they never move next door to move into each other's territory. I think that would be a very suspicious situation.

In this instance, there is a historical explanation for how these people came to be in these regions, which I accept.

The question then is, isn't it ultimately a question [10] of fact how suspicious it is after how many years that something that the Congress apparently expected would turn into the kind of normal competitive market where it would be suspicious if everybody was not competing or competing only in their own little spots, how long does it have to be before you say, you know, that's suspicious again because why aren't these people doing what Congress expected? Is seven years too little? Or can't the plaintiffs draw an inference that Congress intended to turn this into a market like any other, and Congress expected that there were economic incentives that would lead people to engage in this kind of competition, and lo and behold we are not seeing it. Why can't they rely on that? If it is still the same in 10 years would they have a claim? Certainly they wouldn't have a claim.

MR. HANSEN: I am not sure Congress's expectations play a role in this. I think the lens we have to look at here is from the standpoint of the defendants. You have to look at it and there has to be some plus that makes an inference that there is something strange here.

Again, I don't want to fall into the trap of a summary judgment. The pleaded facts establish the following. These companies were created for limited regional markets, to provide local service in those markets. They were only created in 1983. Thereafter, through acquisitions, we see the checkerboard on some of the maps. So the question is raised, [11]

isn't it suspicious that they don't cross the border if they are so close. I grant you, that is the core allegation of their complaint. Everything else, I submit, is speculation, window dressing, misquoting of people.

But to take your question, is it a plus factor that companies in adjacent markets don't jump the border, the answer is in their complaint. There are two ways, according to their complaint, that they could do that. One would be to duplicate the entire telephone infrastructure and to go into competition. Your Honor, I would submit as a matter of logic and common sense, I think everyone would agree, one isn't going to put up the logs and string the poles where the markets are losing their shirts under enormous price pressure.

Then we go to route B, the so-called '96 Act, Telecommunications Act of 1996. They say Congress created this wonderful act that says to you go out of your region and you can take advantage of this thing called unbungled [*sic*] network pricing. I don't want to fall prey to acronyms, but it –

THE COURT: Is this another way of saying they could be a CLEC and somebody else is ILEC?

MR. HANSEN: Exactly, your Honor. Here is why. Their complaint establishes not a reasonable inference, it is contrary to what they needed themselves, and it is why it hasn't happened. Unit P price is in the view of all the ILECS ruinously nuts, a confiscatory pricing model that Congress set [12] up to try and incentivize people to go into these markets. In other words, Congress said we do want to jump status competition and we will do it by requiring the ILEC, us, at near confiscatory rates. The ILEC are united in opposition to that, as any rational business person would be. The confiscation of their property in order to allow rivals to take their customers is the duty of every one of these companies. They are being asked to surrender their property at less than fair market value to allow competition as Congress wants. So they have a pleaded reason not to pursue unit P price out of the region, because it is the very same thing they are trying to kill

in the courts and have killed successfully twice. The only plausible explanation is that you would not go to seek a quick buck across the border at a time when the whole thing fuels your profit and gives it the [*sic*] rivals.

THE COURT: I don't know if this is part of your argument or not. Let me ask. Not only are the defendants fighting on the beaches and the shores to hold off or change the legal landscape, but the plaintiffs themselves allege that another branch of this conspiracy is that they are each fighting off the checks that do come along and try to take advantage of this regulatory regime, and I suppose you could say that to the extent they are successful themselves in beating down competitors who try to come into their area and operate as CLECS, they know very well what is going to confront [13] them if they go and try to do the same thing in somebody else's backyard.

MR. HANSEN: One could say that, and it leapfrogs to my second point, and that is the only way that allegation – using the appropriate Sherman Act standard –

THE COURT: CLEC is the way we pronounce it? Whatever you say.

MR. HANSEN: You're the judge and I'm not.

THE COURT: That and a dollar fifty no longer gets me on the subway.

MR. HANSEN: I probably will lapse into both, your Honor.

The point that I wish to make is, under the antitrust law, this plus factor is only a plus factor if it meets the following criteria. It has to be an action against self-interest, and it is not to pass up. In other words, the question is are you passing it up when you have no better opportunity to use that buck. No such pleading here.

Then I go to the second part of why it makes no sense, why on the face of their complaint, in addition to what you say about defending your own customers and property, which is

in every business's [*sic*] interest, you're an executive and again one of the prime purposes of our argument is that we don't want to put the courts in the position of second-guessing the executives, but thinking for a moment like an executive, you have your [14] lawyers in court knocking out these prices. They are like a sand castle. This is not a matter of expanding our business, this is a matter of becoming a re-seller in someone else's local territory, a business that we have not in any nature or scale done. So the decision to permit investment resources to go into a business, to stake capital in a business based on a pricing model that has twice been overturned and will be up for a third strike any day now is also nuts.

[15] But what I think we have to persuade you of today, your Honor, is that looking at the complaint and the facts they plead, that Mr. Notebaert said that he didn't believe it was a good idea from the standpoint of his business to go in as a CLEC, those do not permit a logical inference of conspiracy.

THE COURT: I hear what you are saying. The problem is that try as you might to put this on the basis of the plaintiffs' pleading, the real question is, is it suspicious. The real question is, is the failure to go into another area contrary to the expected economic interest of the defendants such that a reasonable inference would arise that it's strange that they don't and there must therefore be an agreement. That looks awfully like a question of fact. It is an empirical kind of question about how the business works, and I am left wondering what am I to rely on and how am I to analyze these various questions of what it really would take to move into the next door area. Do I read a book on telecommunications? Do I listen to the representations of counsel? Do people need to submit expert reports? Should the pleading contain some kind of expert analysis that explains why this is suspicious? Is that what they have to do to further their theory so that I don't have to rely essentially on the defendants' theory of the

case, say OK, now I see, there is nothing suspicious about this at all because Mr. Hansen comes in and tells me this is what it takes to compete and it doesn't make any sense and therefore I [16] should not pay any attention to the apparently suspicious pattern?

MR. HANSEN: I believe what I am giving you is a fair reading of what is alleged.

THE COURT: They don't allege that the pricing structure that Congress imposed is nuts.

MR. HANSEN: They did, your Honor. When they cite Mr. Notebaerk's [*sic*] –

THE COURT: They say your guy said it.

MR. HANSEN: That is what they rely on. I don't want to play games, but when a pleader incorporates by reference a statement of one of our directors, that's there for you to look at. That's a fact pleaded by them.

But, your Honor, I will take a step back. I won't ask you to accept any of my inference. We will take your case head on. The mere fact of a business's failure to enter another's line of business has never, to my knowledge – we have looked pretty hard. That has never been looked at by an antitrust court as a suspicious fact itself. It is nothing but parallelism. It is a bootstrapping problem. That has too logically been explained by independent business reasons to move a conspiracy.

Your Honor, the car manufacturers and heart disease [*sic*], they weren't entering a territory. The cases that we cited, they weren't entering a territory.

[17] THE COURT: But really the key thing here is that I need to understand what competing in even the next town, let alone the next region, is not just a matter of mailing out a notice to people who live there, saying hi, you can now buy from us instead of who you are buying from, because in order to buy from us we would either have to have an elaborate infrastructure or we would have to be purchasing facilities from

our competitor in a way that for a variety of reasons wouldn't make sense to do.

MR. HANSEN: Where they say it has been made enormously difficult for CLECS to go into this business, obviously that is something we have to consider. We are nothing better than a CLEC too.

THE COURT: I understand that. I think I have the point. Do you want to talk about the filed rate thing?

MR. HANSEN: I can do it in two sentences. Paragraph 92 of their complaint says, and I am quoting here, their injury consists of paying higher prices for local telephone and/or high speed Internet services than they would have paid in the absence of the violations alleged herein. Every court in this circuit and the Supreme Court has said that that mechanism of injury is barred by the filed rate doctrine. It doesn't matter the conduct of the defendants, it doesn't matter if they are bringing a class action. This case is effectively on all fours with the fount of all filed rate cases, Keogh.

[18] THE COURT: I think I understand that. I only had one question about this, which is, do any of the cases in the filed rate area, and I certainly haven't read all of them – only hit the highlights, I guess – do any of them bar injunctive relief? Because what I am thinking is, I understand the point you are making as applied to damages, that the whole damage claimed is that the rates were high and the rates are tariff rates. But suppose they were able to establish that the CEOs of these four companies sat down together and agreed that it's better to have a little cartel and everybody stay home in their own neighborhood and they could prove that that happened. How would enjoining them not to do that again in the future trench upon anybody's regulatory scheme for setting rates, or how would it have any discriminatory effect at all that would be inconsistent with the rate structure?

MR. HANSEN: It wouldn't, your Honor. However, I don't want to be too broad. Injunctive relief that would change the tariffs would be prohibitive. But an injunction to

restrain conspiratorial agreement would not and the Supreme Court has so suggested.

That said, your Honor, going to the practical consequences of that point, we still have this complaint needing to be dismissed because we can't tell whether they have ever bought a nontariff service. The court would do great service to everyone in dismissing this. If you seek relief in [19] the form of injunctive relief, that does not change the conditions of the tariffs.

THE COURT: I think I understand the position better now. Thank you. Let me hear from plaintiffs.

MR. RICHARDS: Doug Richards from Milberg Weiss for the plaintiffs.

Would your Honor like to deal with questions or should I go right into the presentation?

THE COURT: I am happy to hear the presentation and ask questions afterwards, unless something comes up during.

MR. RICHARDS: I have hard copies of the images that we are putting up and the defendants have copies of these as well. So you can look at the screen and whatever is easiest.

We certainly agree with the court that the Swerkowitz case did not basically change the standard that is applicable to a pleading, but it does have some content to it that is very directly analogous to something that is going on in this case that is sort of an antitrust phenomena, which the court may or may not have familiarity with, which is the Monsanto case. There is this body of law in the antitrust world about parallel conduct and the need for an evidentiary standard when you need to prove your case by inferential case, which is based on the plus factors soft parallel conduct. That antitrust construct is summary judgment law. It is an evidentiary standard. It is almost precisely analogous to the doctrine in the employment [20] discrimination context of how you prove an inference case when you don't have direct evidence of discrimination.

THE COURT: I follow the analogy and I understand that point about how parallel conduct and plus factors function at the level of fact finding, but Mr. Hansen's argument – and I am not sure that I found any case other than the Heart Disease Research – that's the only one he referred to – on an appellate level, but there are district court cases that go that way – says something at a minimum like this, that you can't embark on discovery and an [*sic*] potential industry restructuring project simply by saying there is a conspiracy there, now we've pled it, and even saying exactly what the conspiracy is, because I think you tell us what the conspiracy alleged is. It's an agreement to divide markets that I think would clearly be a violation of the antitrust laws – no one is telling me it wouldn't be – if people actually did get together and make that agreement. But I think he is citing at least one binding authority and a bunch of district court decisions that seem to say that isn't enough somehow, not because there is a Rule 9 issue but just because it's too easy – they have to give something more. I am not sure what that is and how you tell when you cross that line, but isn't there something at the pleading, law at the pleading level that is separate from all the summary judgment cases?

I fully appreciate and agree with what you say about [21] how some of the stuff they cite is in summary judgment cases and the business about the plus factors really goes all the way back to the movie theater cases and all that other stuff, and that's all about substantive law and not about the pleading. But there is authority out there that says you can't just say a conspiracy.

MR. RICHARDS: There is, your Honor, and that is really the subject of slide 1 of our presentation. I don't mean to say there is nothing like that, there are cases like that. When these cases say when you really deal with nothing but a bare bones allegation of conspiracy, you are dealing with situations where you don't even fully understand what the conspiracy is. Think of a three-page complaint that says the de-

fendants conspired against me to hurt me. period, end. It doesn't explain the market, doesn't explain the context – provides nothing so you can even make sense of it. That is not sufficient to withstand a motion to dismiss. We don't quarrel with that. This complaint is a far cry from anything like that. But that is basically what this law is dealing with.

The defendants have sent a copy of Judge Pauley's recent decision to the court. It is actually a very nice illustration of where a court can kind of go wrong. In that case the court cites Ambuk, a summary judgment opinion. It is a Second Circuit summary judgment case for the proposition that you have to allege a factual circumstance to allege antitrust [22] conspiracy. So it is sort of like this sort of inferential case stuff. There is no Second Circuit case that has ever – and we have said this in our brief and they haven't identified any that does. There is no Second Circuit case that has ever applied Monsanto, excluding the possibility of independent action rationale, as a basis for rejecting a complaint. There are cases like this case where a court says, very logically, look, if there is enough pleaded in the complaint to survive even that test, then of course it survives a motion to dismiss. That's perfectly logical. It doesn't follow from that that if you don't do that you're dismissed. That is in effect what they time and time again are trying to do here. That is just not the law. It is not the law under Swerkowitz, it hasn't been the law really ever. I would submit that Swerkowitz is relevant because the Second Circuit was trying to adopt heightened pleading criteria in employment discrimination and that kind of thing, and Swerkowitz, after Leatherman, is an unambiguous statement from the Supreme Court that that is not to be done. Unless it falls within Rule 9B, this heightened pleadings standard to weed out cases so that you can decide whether it is a good case or a bad case are not to be done. That's what it says. Unless it's there in 9B, you can't do this. So it is relevant and it is inconsistent with some of the reasoning in some of the district court cases even in this district prior to Swerkowitz. It is certainly also completely [23] consistent with

Tommy v. Gibson and the cases from the fifties. That is basically where we say the law is.

Slide 2, if a complaint is an empty vessel, you can't identify what kind of conspiracy they are claiming in a way that makes sense, of course you can dismiss it. This complaint, just to argue the facts for a moment, is so far from that. What is alleged is a stark parallel failure of the defendants to compete with each other. Even in the summary judgment context, if the court looks at the Fructose Corn decision of the Second Circuit, even in the context of summary judgment to defendants not competing with one another when one would expect them to do that they were –

THE COURT: The question of what one would expect is the difficult issue here. You know, if I looked at the kind of map that exists here in some business that had grown up in some other way, one might say isn't it odd that people have stayed always and forever in their same territory. But of course they got these territories at a time when they were monopolies and were locally regulated and were put in those territories. So now the question becomes not this pattern couldn't have arisen by accident, we know it didn't arise by accident, but it arose legitimately, and the question is, is there some natural reason to think that by now it would have changed.

So it's not just the map as such, it is a sort of map with a time dimension to it also that we are looking at, and [24] what I hear Mr. Hansen saying – I am not sure whether this works at the pleading stage or not but it is still pretty persuasive – is, each of these companies starts out with this huge competitive advantage of having been a monopoly in its own territory. Isn't it reasonable for them each independently to decide, you know, we'd much rather still have the old regime and we are going to do everything we can to keep out competitors from our turf and to try and show the world that that's the way the system should be, and picking up, as they interpret Notebaert's comments – I don't know if it is the

right interpretation or not but it is their argument – is counterproductive not because they will come back and raid ours, it is bad because it shows Congress that this can be done and we don't want them to think this can be done. We want them to leave us the hell alone in our little fiefdoms because that was a good deal for us. Each one independently may think that and it is perfectly logical for them to stay where they are.

MR. RICHARDS: But they each have a stake in the other one's – suppose neighbors have kids cutting through their yards on the way to school. If they both work to keep the kids out of the yards, it works better to keep the kids out than if only one does.

We allege in the complaint – this is fairly brief but we get the benefit of inferences. The defendants contend CLECS are hurting them by leasing network components at below-cost [25] rates. They are saying what is happening to us is unfair, the CLEC is unfairly competitively advantaged, that's what they would do if they were competing. Yet they don't do it. That is exactly the kind of plus factor that they are claiming we have to allege, that they are acting against their individual self-interest.

THE COURT: Again, this is the debate that makes me uncomfortable at the pleading stage, but if we are able to have it, I am not sure that I am unpersuaded by the argument, because it is one thing for somebody who is looking for a toehold in this business to say here I will be a CLEC and take advantage of these alleged advantages, it is another thing for somebody who has a whole line of business that they are running to decide we can also do this other thing, which is a very different thing, isn't it? When you say it is the sale of telecommunications services, isn't it a very different thing to be this kind of reseller than it is to operate the underlying equipment?

MR. RICHARDS: It is a different thing but I think the investment necessary in order to do it is not very great.

THE COURT: Sure, but the investment isn't very great, obviously, to set up a newspaper stand on the corner. That doesn't mean Verizon would be expected to do it if it is not the line they are in and not something they are very good at and not where they want to spend their money.

[26] MR. RICHARDS: If you look at Judge Pauley's decision, one of the opinions it cites, NASDAQ, it says it is unnecessary for plaintiffs to plead the basis upon which the combination will be proven. The goals of efficient judicial administration are retarded, not advanced, when the pleadings are used as a battleground without the necessary development on which to focus a decision.

I can't say it any better than that. This back and forth debate without a factual record on the basis of a complaint which is supposed to only have to state a short and simple claim under Rule A is just not appropriate. It mires us as it does now in elaborate, Byzantine early debate unrooted in facts. It is not appropriate and not where we should be in a motion to dismiss. To the extent that is their argument, and it is, the motion should be denied.

THE COURT: I hear what you are saying. I will be much better off after I hear the parties' hired economists making the same arguments you are making now, but with charts and graphs.

MR. RICHARDS: One also doesn't have to be an economist to look at a map like this one and see these little areas completely surrounded by the territory of one or another island, tiny islands in the stream where people are the incumbents, where they are not advertising. Take this area in Florida. They are advertising all around for this type of [27] service and people all over are getting the ads on television, just to try to become the dominant player in the CLEC, and they are not doing it. Who needs an economist? Does that mean that they can't bring an economist in who can try and argue that is their reason? They can put in evidence.

THE COURT: I am glad defendants have that right. But look at Florida there. It looks like Tampa is kind of excluded from Verizon's little island. Someplace on the West Coast there is a little bit of gray surrounded by red.

MR. RICHARDS: Yes, entirely surrounded. A lot of these sort of odd areas, as I understand it, are a legacy of the action of GTE. But the fact that that would stay the state of play without restructuring to deal with economic realities is extremely suspicious.

THE COURT: Well, it would be very suspicious if what we were talking about was a catalog mailer who chooses to mail to all the zip codes except Tampa central, and all it would take is throwing a few more into the mails and they could complete [*sic*] in that area, too. Then you would have to wonder why they are doing that. But Mr. Hansen says in order to pick off that gray area, it is not just a matter of including in their TV ads and now we serve Tampa too. They would either have to build a network in Tampa – that is not really your argument. Your argument is that they go into Tampa as a CLEC. That means they will have to get whichever of the defendants is the ILEC [28] in that zone and purchase block services from them and then market that in some way to the people there, and I guess the question is how the hell do I know whether that would make sense for them to do or not without a factual record.

MR. RICHARDS: The court can take notice that there are lots of CLECS who have been stymied in their efforts, trying to do it, and brought many lawsuits against these defendants.

There are others who have invested –

THE COURT: Wait a minute. I thought this was CLEC. A minute ago it was just a matter of flick your fingers and you could be in that area and it was Mr. Hansen saying it would cost billions of dollars. Here you say any idiot can do it.

MR. RICHARDS: We have in our brief statements in Congress to the effect that people who have tried to do this have spent many tens of billions of dollars and that money has gone up in smoke. So the idea that this doesn't make any sense as a business model is crazy. It doesn't make sense to these defendants to let it happen, but it makes sense to do it. They don't want to do it and they don't want to let anyone else do it. If that isn't a motive and the basis for a plausible conspiracy, I can't imagine what could be.

THE COURT: I guess I am still wondering why, assuming that it makes perfect sense for, I don't know, Verizon in New York to do anything it can to keep out a CLEC, why do they care [29] if QWest does the same thing in, wherever they are, Montana? Why does it advantage Verizon in beating off its CLEC competitors to have other people be successful too?

MR. RICHARDS: One example is a point that the court made a little earlier, which is, if one sees that it happens in one place, one is going to believe that it happens in another place. They all benefit, that's right, because then they are in a position to say it just doesn't work. But if one of them didn't participate in the conspiracy as alleged, let it all happen, let the CLEC happen –

THE COURT: But then yes, I suppose if everybody else does it – it being fight off the incursions of CLEC – if everybody else does it too, that is good for me, as one of the ILEC. But I can pretty much count on the fact that they are going to do it to [*sic*] too, because it is natural for anybody that has their monopoly to want to fight off competitors. I see no reason that I have to call up the president of QWest and say hey, you know, you better keep these CLECS out of your territories. It seems the most natural thing in the world.

MR. RICHARDS: The moss [*sic*] natural thing would be for them to try to exploit the business opportunities that exist in the other ILEC territories as Congress envisioned and as was expected. How is it reasonable to give the defendants the benefit of a sort of inference that Congress was out of its

mind? I think it is entirely turning pleading standards on [30] their head, but that is the way defendants are using to approach a motion to dismiss.

THE COURT: And I suppose their protection against spelling [*sic*] millions of dollars on discovery and having it turn out that there was no real evidence is Rule 11. So long as you are comfortable that you've got enough evidence to get by Rule 11, the notice pleading system works.

MR. RICHARDS: That is some comfort but ultimately there is no way of protecting plaintiffs from a danger that plaintiffs could ever be wrong in a case. The way it was decided this would work is that plaintiffs would get the benefit of discovery and cases that have no substantive merits would be pleaded out by summary judgment. It is just law, and in effect that's the opposite of what the defendants are trying to argue on their 12(b) (6) motion.

THE COURT: Let me ask you to turn to the filed rate issue for a minute. You are not telling me that I cannot apply the filed rate doctrine, whatever it is, to this case, are you?

MR. RICHARDS: I absolutely am. I am saying that the filed rate doctrine has absolutely no application to this case.

THE COURT: I should have stated the question differently. You are not telling me that I can disregard the filed rate doctrine or tell me that it has been superseded by events.

MR. RICHARDS: No.

* * * * *

Supreme Court, U.S.
FILED
AUG 2 5 2006
OFFICE OF THE CLERK

No. 05-1126

IN THE

Supreme Court of the United States

BELL ATLANTIC CORPORATION, *ET AL.*,
Petitioners,
v.
WILLIAM TWOMBLY, *ET AL.*, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONERS

STEPHEN M. SHAPIRO
KENNETH S. GELLER
RICHARD J. FAVRETTO
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000
Counsel for BellSouth Corporation

TIMOTHY BEYER
BROWNSTEIN HYATT & FARBER, P.C.
410 17th Street, 22nd Floor
Denver, Colorado 80202
(303) 223-1116
Counsel for Qwest Communications International Inc.

August 25, 2006

MICHAEL K. KELLOGG
Counsel of Record
MARK C. HANSEN
AARON M. PANNER
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
Counsel for AT&T Inc. (formerly SBC Communications Inc.)

RICHARD G. TARANTO
FARR & TARANTO
1220 19th Street, N.W., Suite 800
Washington, D.C. 20036
(202) 775-0184
Counsel for Verizon Communications Inc.

(additional counsel listed on inside cover)

LAURA J. COLEMAN
J. HENRY WALKER
MARC W.F. GALONSKY
ASHLEY WATSON
BELLSOUTH CORPORATION
1155 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 249-2720
Counsel for BellSouth Corporation

JOHN THORNE
PAUL J. LARKIN, JR.
DAVID E. WHEELER
ROBERT J. ZASTROW
VERIZON COMMUNICATIONS INC.
1515 North Courthouse Road
Arlington, Virginia 22201
(703) 351-3900

DAN K. WEBB
CHARLES B. MOLSTER III
WINSTON & STRAWN LLP
35 W. Wacker Drive
Chicago, Illinois 60601
(312) 558-5856
Counsel for Verizon Communications Inc. (successor-in-interest to Bell Atlantic Corporation)

CYNTHIA P. DELANEY
QWEST COMMUNICATIONS INTERNATIONAL INC.
1801 California Street
Denver, Colorado 80202
(303) 383-6790
Counsel for Qwest Communications International Inc.

JAVIER AGUILAR
WILLIAM M. SCHUR
AT&T SERVICES, INC.
175 E. Houston Street, 4th Floor
San Antonio, Texas 78205
(210) 351-3409
Counsel for AT&T Inc. (formerly SBC Communications Inc.)

QUESTION PRESENTED

Whether a complaint states a claim under Section 1 of the Sherman Act, 15 U.S.C. § 1, if it alleges that the defendants engaged in parallel conduct and adds a bald assertion that the defendants were participants in a "conspiracy," without any allegations that, if later proved true, would establish the existence of a conspiracy under the applicable legal standard.

LIST OF PARTIES TO THE PROCEEDINGS

Petitioners Bell Atlantic Corporation, BellSouth Corporation, Qwest Communications International Inc., SBC Communications Inc. (now known as AT&T Inc.), and Verizon Communications Inc. (successor-in-interest to Bell Atlantic Corporation) were defendants in the district court and appellees in the court of appeals.

Respondents William Twombly and Lawrence Marcus, both individually and on behalf of all others similarly situated, were plaintiffs in the district court and appellants in the court of appeals.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, petitioners Bell Atlantic Corporation, BellSouth Corporation, Qwest Communications International Inc., SBC Communications Inc. (now known as AT&T Inc.), and Verizon Communications Inc. (successor-in-interest to Bell Atlantic Corporation) state the following:

Bell Atlantic Corporation. On June 30, 2000, GTE Corporation and Bell Atlantic Corporation merged, and Bell Atlantic Corporation subsequently changed its name to Verizon Communications Inc., its successor-in-interest. Verizon Communications Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

BellSouth Corporation. BellSouth Corporation has no parent company, and no publicly held company owns 10% or more of its stock.

Qwest Communications International Inc. Qwest Communications International Inc. has no parent company. Qwest's securities are publicly traded. As of August 22, 2006, the following publicly held corporations had reported ownership of 10% or more of the publicly issued securities of Qwest Communications International Inc.: Legg Mason, Inc. (through various wholly owned subsidiaries).

SBC Communications Inc. On November 18, 2005, SBC Communications Inc. merged with AT&T Corp. and changed its name to AT&T Inc. AT&T Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

Verizon Communications Inc. Verizon Communications Inc. is the successor-in-interest to Bell Atlantic Corporation. Verizon Communications Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES TO THE PROCEEDINGS ii

CORPORATE DISCLOSURE STATEMENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

A. Background 2

B. The Complaint 5

C. The District Court's Decision 8

D. The Court of Appeals' Opinion 10

SUMMARY OF ARGUMENT 12

ARGUMENT 16

I. TO STATE A CLAIM UNDER SECTION 1, A PLAINTIFF MUST ALLEGE FACTS SUFFICIENT TO SUPPORT THE CONCLUSION THAT DEFENDANTS CONSPIRED 16

A. Rule 8 Requires Pleading of Facts, Not Mere Conclusory Assertions, To Support a Plaintiff's Claim 16

B. A Conclusory Allegation of "Conspiracy" Is Insufficient To State a Claim Under Section 1 20

C. When a Complaint Alleges Conspiracy Based on Parallel Conduct, the Factual Allegations Must Support an Inference that the Defendants Conspired 23

D. The Second Circuit's Standard, Which Assumes the Existence of Facts Not Alleged, Is Inconsistent with Rule 8 and Substantive Antitrust Standards 27

II. THE COMPLAINT'S ALLEGATIONS FAIL TO SUPPORT AN INFERENCE OF CONSPIRACY UNDER THE PROPER LEGAL STANDARD 29

A. The Claim that ILECs Resisted Costly and Burdensome Network-Sharing Duties Does Not Support an Inference of Conspiracy 30

B. The Claim that ILECs Did Not Meaningfully Enter Each Others' Traditional Service Territories Does Not Support an Inference of Conspiracy 33

CONCLUSION 38

TABLE OF AUTHORITIES

Page

CASES

AD/SAT, Div. of Skylight, Inc. v. Associated Press, 181 F.3d 216 (2d Cir. 1999) 37

Allen v. WestPoint-Pepperell, Inc., 945 F.2d 40 (2d Cir. 1991) 36

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 26

Andrx Pharms., Inc. v. Biovail Corp., 256 F.3d 799 (D.C. Cir. 2001) 34

Anza v. Ideal Steel Supply Corp., 126 S. Ct. 1991 (2006) 18, 19

Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983) 13, 14, 16, 21, 28

AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999) 3, 4

Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, Inc., 203 F.3d 1028 (8th Cir. 2000) 24

Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) 22

Branch v. Tunnell, 14 F.3d 449 (9th Cir. 1994) 36

Brand Name Prescription Drugs Antitrust Litig., In re, 186 F.3d 781 (7th Cir. 1999) 24

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993) 24, 33

Cayman Exploration Corp. v. United Gas Pipe Line Co., 873 F.2d 1357 (10th Cir. 1989) 25

Citric Acid Litig., In re, 191 F.3d 1090 (9th Cir. 1999) 24

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) 34

Conley v. Gibson, 355 U.S. 41 (1957) 17, 28, 29

Covad Communications Co. v. FCC, 450 F.3d 528 (2006) 4

Davis v. Passman, 442 U.S. 228 (1979) 22

DM Research, Inc. v. College of Am. Pathologists, 170 F.3d 53 (1st Cir. 1999) 13, 17, 21, 28

Doug Grant, Inc. v. Greate Bay Casino Corp., 232 F.3d 173 (3d Cir. 2000) 17

Dry v. United States, 235 F.3d 1249 (10th Cir. 2000) 17

Dual-Deck Video Cassette Recorder Antitrust Litig., In re, 11 F.3d 1460 (9th Cir. 1993) 34

Dura Pharms., Inc. v. Broudo, 544 U.S. 336 (2005) 12, 17, 19, 20, 21

Estate Constr. Co. v. Miller & Smith Holding Co., 14 F.3d 213 (4th Cir. 1994) 21

First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253 (1968) 25

Flat Glass Antitrust Litig., In re, 385 F.3d 350 (3d Cir. 2004), *cert. denied*, 544 U.S. 948 (2005) 24

Heart Disease Research Found. v. General Motors Corp., 463 F.2d 98 (2d Cir. 1972) 21

Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corp., 309 F.3d 71 (2d Cir. 2002), *rev'd*, 540 U.S. 398 (2004) 5

Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993) 12, 17, 26

Lombard's, Inc. v. Prince Mfg., Inc., 753 F.2d 974 (11th Cir. 1985) 21

Manufactured Home Communities Inc. v. City of San Jose, 420 F.3d 1022 (9th Cir. 2005) 17

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 13, 16, 24, 25

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 22

Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984) 13, 16, 24, 25

Out Front Productions, Inc. v. Magid, 748 F.2d 166 (3d Cir. 1984) 34

Papasan v. Allain, 478 U.S. 265 (1986) 12, 17, 18

Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 22

Serfecz v. Jewel Food Stores, 67 F.3d 591 (7th Cir. 1995) 32

Sofamor Danek Group, Inc., In re, 123 F.3d 394 (6th Cir. 1997) 17

Southway Theatres, Inc. v. Georgia Theatre Co., 672 F.2d 485 (5th Cir. 1982) 30

Stachowski v. Town of Cicero, 425 F.3d 1075 (7th Cir. 2005) 17

Summit Health, Ltd. v. Pinhas, 500 U.S. 322 (1991) 18

Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) 34

Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002) 22, 23, 29

Tal v. Hogan, 453 F.3d 1244 (10th Cir. 2006) 21

Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537 (1954) 23-24, 33

Toys "R" Us, Inc v. FTC, 221 F.3d 928 (7th Cir. 2000) 24-25

United States v. AT&T Co., 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) 2

United States v. Employing Plasterers Ass'n of Chicago, 347 U.S. 186 (1954) 18

USTA v. FCC:

290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 940 (2003) 4

359 F.3d 554 (D.C. Cir.), *cert. denied*, 543 U.S. 925 (2004) 4

Veney v. Wyche, 293 F.3d 726 (4th Cir. 2002) 17

Verizon Communications Inc. v. FCC, 535 U.S. 467 (2002) 31

Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) ... 3, 5, 14, 20, 31, 35

Viazis v. American Ass'n of Orthodontists, 314 F.3d 758 (5th Cir. 2002) 24

Williamson Oil Co. v. Philip Morris USA, 346 F.3d 1287 (11th Cir. 2003) 24

Wilson v. Schnettler, 365 U.S. 381 (1961) 16, 28

ADMINISTRATIVE DECISIONS

Local Competition Order:

First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, *modified on recon.*, 11 FCC Rcd 13042 (1996), *vacated in part, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) 3

Triennial Review Order:

Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003), *vacated in part and remanded, USTA v. FCC*, 359 F.3d 554 (D.C. Cir.), *cert. denied*, 543 U.S. 925 (2004) 4

Triennial Review Remand Order:

Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 (2005), *petitions for review denied, Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006) 4

UNE Remand Order:

Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999), *vacated and remanded, USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 940 (2003) 4

STATUTES AND RULES

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* 19

Sherman Act, 15 U.S.C. §§ 1 *et seq.*:

§ 1, 15 U.S.C. § 1 ..... 1, 5, 10, 12, 16, 20, 21, 23, 24, 25

§ 2, 15 U.S.C. § 2 ..... 5, 6, 20, 30

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ..... 3, 5, 14, 20, 31

47 U.S.C. § 251 37

47 U.S.C. § 251(d)(2) 3

47 U.S.C. § 271 3

28 U.S.C. § 1254(1) 1

Fed. R. Civ. P.:

Rule 1 27

Rule 8 ..... 12, 16, 17, 18, 19, 21, 23, 27

Rule 8(a) 8, 12

Rule 8(a)(2) 16

Rule 12 21

Rule 12(b)(6) 12, 16, 17

ADMINISTRATIVE MATERIALS

Industry Analysis & Technology Division, Wireline Competition Bureau, FCC, *Local Telephone Competition: Status as of December 31, 2005* (July 2006) 5

OTHER MATERIALS

Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*:

Vol. 6 (2d ed. 2003) 15, 33, 35, 37

(Supp. 2006) 14, 20, 35

Consol. Am. Class Action Compl., *In re SBC Communications, Inc. Antitrust Litig.*, No. 3:02CV1617 (DJS) (D. Conn. filed Feb. 19, 2003) 5

Christopher M. Fairman, *The Myth of Notice Pleading*, 45 Ariz. L. Rev. 987 (2003) 21

Fleming James, Jr., *et al.*, *Civil Procedure* (5th ed. 2001) 23

Joint Appendix, *Anza v. Ideal Steel Supply Corp.*, No. 04-443 (U.S. filed Jan. 12, 2006) 18, 19

Joint Appendix, *Dura Pharms., Inc. v. Broudo*, No. 03-932 (U.S. filed Sept. 13, 2004) 19

Joint Appendix, *Swierkiewicz v. Sorema N.A.*, No. 00-1853 (U.S. filed Nov. 16, 2001) 22

Joint Appendix, *Verizon Communications Inc. v Law Offices of Curtis V. Trinko, LLP*, No. 02-682 (U.S. filed May 23, 2003) 20, 35

6 James Wm. Moore, *et al.*, *Moore's Federal Practice* (3d ed. 2003) 26

Jon Van, *Ameritech Customers Off Limits: Notebaert*, Chi. Trib., Oct. 31, 2002, at Business p.1 36

Jon Van, *Lawmakers Seek Probe of Bells; Do Firms Agree Not To Compete?*, Chi. Trib., Dec. 19, 2002, at Business p.2 36

5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* (3d ed. 2004) ... 12, 13, 17, 18, 21

OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a-34a) is reported at 425 F.3d 99. The district court's opinion (Pet. App. 35a-58a) is reported at 313 F. Supp. 2d 174.

JURISDICTION

The court of appeals entered its judgment on October 3, 2005. A timely petition for rehearing was denied on January 3, 2006. Pet. App. 59a-60a. The petition for a writ of certiorari was filed on March 6, 2006, and was granted on June 26, 2006 (126 S. Ct. 2965). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, is set forth at Pet. App. 61a.

STATEMENT OF THE CASE

Plaintiffs below are representatives of a purported class consisting of all users of telephone and Internet service in the continental United States over the past decade. Plaintiffs alleged that incumbent telephone companies, acting in parallel: (1) resisted new entrants' efforts to enter their respective markets and (2) failed to compete in each others' territories as new entrants. To these allegations of purely parallel conduct, plaintiffs added a bald allegation that defendants were engaged in a conspiracy – though they did not say when (sometime in the last decade); they did not say where (somewhere in the continental United States); and they did not say who (the four defendants have nine major corporate predecessors and hundreds of thousands of employees). Plaintiffs implicitly conceded below that they lacked any basis to make such *direct* factual allegations of conspiracy. Instead, plaintiffs relied entirely on the *inference* of conspiracy that they claimed should be drawn from the alleged parallel conduct.

The district court (Lynch, J.) held that these allegations failed to state a claim under Section 1 of the Sherman Act. The court held that when a complaint seeks to draw an

inference of agreement from allegations of otherwise lawful parallel conduct

> the basic requirement that plaintiffs must fulfill is to allege facts that, given the nature of the market, render the defendants' parallel conduct, and the resultant state of the market, suspicious enough to suggest that defendants are acting pursuant to a mutual agreement rather than their own individual self-interest.

Pet. App. 46a. The district court went on to hold that the complaint failed to meet that standard because the parallel conduct alleged by plaintiffs was perfectly explicable in terms of independent self-interest and did not support an inference of conspiracy under this Court's precedents.

The court of appeals reversed. It rejected the district court's standard and held instead that

> to rule that allegations of parallel anticompetitive conduct fail to support a plausible conspiracy claim, a court would have to conclude that there is *no set of facts* that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence.

Id. at 25a (emphasis added). Under the Second Circuit's standard, a complaint alleging otherwise innocuous parallel conduct can survive a motion to dismiss based merely on the *possibility* that facts not alleged might yet be found that would support the claim for relief. That decision, wrong as a matter of pleading law and harmful as a matter of antitrust policy, should be reversed.

A. Background

1. In 1982, the AT&T divestiture decree created seven Regional Bell Operating Companies ("Bell companies") and assigned each of them to a different portion of the country. *See United States v. AT&T Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). These seven Bell companies – predeces-

sors of the four defendants – provided local telephone service pursuant to state-authorized exclusive franchise arrangements but were barred from offering long-distance service. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 413-14 (1999) (Breyer, J., concurring in part and dissenting in part).

The Telecommunications Act of 1996 (the "1996 Act") dramatically changed this regime. It eliminated the state-authorized exclusive franchises that had prevented entry in most local telephone markets, and it enacted a series of affirmative obligations, binding on the Bell companies and other incumbent telephone companies, intended to jump-start competitive entry. In return for opening their local markets to competition, Bell companies were promised the opportunity – once they demonstrated full compliance with their market-opening obligations – to enter the long-distance business on a state-by-state basis. *See generally* 47 U.S.C. § 271. Between 1999 and 2003, after spending billions of dollars on regulatory compliance efforts, and having their market-opening efforts exhaustively scrutinized by the Department of Justice and by federal and state regulatory authorities, all the Bell companies earned approval to offer long-distance service in their respective states.

2. Among the obligations created by the 1996 Act was the requirement that incumbents "unbundle" – that is, share with new entrants at low, cost-based rates – certain elements of their local networks. *See Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 405-06 (2004). Section 251(d)(2) directed the Federal Communications Commission ("FCC") to determine "what network elements should be made available" by incumbents based on whether lack of access to such elements would "impair the ability" of new entrants to provide competing telephone service. 47 U.S.C. § 251(d)(2). In its *Local Competition Order*, 11 FCC Rcd 15499, ¶¶ 367-451 (1996), the FCC directed the incumbents to make available *all* of the facilities required to provide basic local telephone service. As a result, new entrants could rely on a complete "platform" of "unbundled

network elements" (known as the "UNE-platform" or "UNE-P") at cost-based rates without investing in any facilities of their own.

The FCC's UNE-P regime did not survive judicial review. First, this Court vacated the FCC's "blanket" unbundling rules in *Iowa Utilities Board*. *See* 525 U.S. at 387-92. After the FCC re-adopted those rules virtually unchanged in its *UNE Remand Order*, 15 FCC Rcd 3696 (1999), the D.C. Circuit vacated them. *See USTA v. FCC*, 290 F.3d 415, 422 (D.C. Cir. 2002) ("*USTA I*"), *cert. denied*, 538 U.S. 940 (2003). Despite these two judicial vacaturs, the FCC, in its 2003 *Triennial Review Order*, 18 FCC Rcd 16978 (2003), issued new unbundling rules that again sought to preserve blanket unbundling in most circumstances, leading to a second vacatur by the D.C. Circuit. *See USTA v. FCC*, 359 F.3d 554, 576 (D.C. Cir.) ("*USTA II*"), *cert. denied*, 543 U.S. 925 (2004). Finally, in the wake of *USTA II*, the FCC adopted rules that phased out the UNE-P, *see Triennial Review Remand Order*, 20 FCC Rcd 2533 (2005), a decision that the D.C. Circuit recently upheld, *see Covad Communications Co. v. FCC*, 450 F.3d 528 (2006).

Throughout this period, the incumbents (also called "incumbent local exchange carriers" or "ILECs") generally continued, under pressure from regulators, to make the UNE-P available to new entrants without interruption, until the FCC finally ruled that such access was no longer required. Despite extreme uncertainty as to whether the UNE-P would remain available, many new entrants – companies known as "competitive local exchange carriers" or "CLECs" – widely relied on it. Indeed, as a result of "highly attractive" cost-based rates, *USTA I*, 290 F.3d at 424, the UNE-P became almost the exclusive focus of CLEC efforts to reach local residential and small business (*i.e.*, "mass market") customers: by mid-2004, dozens of CLECs were serving, in total, more than 17 million customers using the UNE-P. With the elimination of the UNE-P, however, the number of mass-market customers served by CLECs declined rapidly, even though

ILECs made replacement arrangements available at market-based prices. *See* Industry Analysis & Technology Division, Wireline Competition Bureau, FCC, *Local Telephone Competition: Status as of December 31, 2005*, at Table 4 (July 2006).

B. The Complaint

Almost from the start, the 1996 Act spawned not only "interminable" regulatory litigation at the state and federal level, *Trinko*, 540 U.S. at 414, but also a parallel track of antitrust litigation.

Most of these cases made essentially the same claim: that ILECs' alleged failure to share their networks adequately had frustrated CLEC entry and constituted "exclusionary conduct" prohibited by Section 2 of the Sherman Act. In 2002, the Second Circuit, reversing a decision of the district court, ruled that such allegations stated a claim. *See Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corp.*, 309 F.3d 71 (2d Cir. 2002), *rev'd*, 540 U.S. 398 (2004). Following that ruling, William Twombly sued SBC in the District of Connecticut, on behalf of a purported class, under Section 2. He claimed that 12 categories of conduct, all related to insufficient sharing by SBC, constituted anticompetitive conduct designed "to restrain, stifle and delay any meaningful competition for local telephone and/or high-speed internet services." Consol. Am. Class Action Compl. ¶ 30, *In re SBC Communications, Inc. Antitrust Litig.*, No. 3:02CV1617 (DJS) (D. Conn. filed Feb. 19, 2003). (Twombly was not alone: class action plaintiffs filed multiple lawsuits against SBC and Verizon in the Second Circuit.) After this Court reversed the Second Circuit in *Trinko*, holding that the claims of insufficient sharing were not actionable under Section 2, Twombly abandoned his monopolization complaint.

But the claims continued in another form. Twombly, later joined by a second purported class representative, brought this separate class action complaint in the Southern District of New York under Section 1. In their consolidated

complaint, plaintiffs alleged that "Defendants . . . have engaged and continue to engage in unanimity of action by committing one or more of the following wrongful acts in furtherance of a common anticompetitive objective to prevent competition . . . in their respective local telephone and/or high speed internet services markets"; the complaint then listed precisely the same 12 categories of conduct that provided the basis for Twombly's earlier complaint under Section 2. JA 24-26 (Am. Compl. ¶ 47). The complaint added one more allegation: that defendants "have refrained from engaging in meaningful head-to-head competition in each other's markets." JA 21 (¶ 39).

Although plaintiffs alleged that "Defendants and their co-conspirators engaged in a contract, combination or conspiracy," JA 30 (¶ 64), the complaint made clear that the sole basis for the allegation was the observed marketplace conduct of defendants (and one newspaper quote attributed to one of the defendant's executives). Plaintiffs alleged no facts directly indicating any agreement among defendants. The complaint failed to allege when the agreement was reached, "the exact dates being unknown to Plaintiffs." *Id.* The complaint failed to identify which of the corporate predecessors of the four defendants participated in the conspiracy. It equally failed to identify any of the "other persons, firms, corporations and associations" that also allegedly participated in the conspiracy. JA 14 (¶ 16). And, although the complaint alleged that defendants "communicate amongst themselves through a myriad of organizations," JA 23 (¶ 46), it neither suggested that such communications are suspicious in this industry (where, for example, network interconnection and standard-setting require joint activities) nor identified a single occasion on which any relevant agreement was reached, the mechanism for enforcing any such agreement, or any individual parties involved in making, enforcing, or carrying out any such agreement.

Instead, plaintiffs "allege[d] *upon information and belief*," "[i]n the absence of any meaningful competition between the

[defendants] in one another's markets, and in light of the parallel course of conduct that each engaged in to prevent competition from [new entrants]," that "Defendants have entered into a contract, combination or conspiracy." JA 27 (¶ 51) (emphasis added).

Plaintiffs also included two types of allegations intended to bolster their conjecture. First, with regard to the alleged agreement to resist sharing their network facilities, the complaint alleged that, "[h]ad any one of the Defendants not sought to prevent CLECs . . . from competing effectively . . . , the resulting greater competitive inroads into that Defendant's territory would have revealed the degree to which competitive entry by CLECs would have been successful in the other territories in the absence of such conduct" and "would have enhanced the likelihood that such a CLEC might present a competitive threat in other Defendants' territories as well." JA 26-27 (¶ 50).

Second, with regard to the alleged agreement not to compete meaningfully as CLECs, the complaint alleged that the "structure of the market . . . is such as to make a market allocation agreement feasible" in that "[e]laborate communications . . . would not have been necessary in order to enable Defendants to agree to allocate territories" and "[i]f one of the Defendants had broken ranks and commenced competition in another's territory the others would quickly have discovered that fact." JA 26 (¶¶ 48, 49). Plaintiffs further argued that each defendant's failure to compete significantly even where their respective traditional local service territories abut or in some cases surround those of the other defendants "would be anomalous in the absence of an agreement." JA 21 (¶ 40). The complaint alleged that, in competing for business in such nearby areas, each defendant would have "substantial competitive advantages," *id.* (¶ 41), though the complaint did not identify them – and did not allege that the asserted advantages made entry into nearby areas a better use of any defendant's resources than other business opportunities or needs. Moreover, plaintiffs alleged, an executive of one of

the defendants had commented that competing as a CLEC in the territory of one of the other defendants "might be a good way to turn a quick dollar but that doesn't make it right," JA 22 (¶ 42), 41, ignoring the same executive's statement, in the same article, that such entry is not a "sustainable economic model," *see* JA 42.

C. The District Court's Decision

The district court granted defendants' motion to dismiss for failure to state a claim. Judge Lynch began by noting that, "absent an agreement among competitors to restrain trade, anti-competitive behavior does not violate § 1." Pet. App. 40a. Accordingly, to establish their entitlement to relief under Federal Rule of Civil Procedure 8(a), plaintiffs must allege facts that, drawing all inferences in plaintiffs' favor, show the existence of such an agreement.

Noting the absence of direct factual allegations to support the existence of any agreement, Judge Lynch began his analysis by observing that "simply stating that defendants engaged in parallel conduct, and that this parallelism must have been due to an agreement, would be equivalent to a conclusory, 'bare bones' allegation of conspiracy" and "insufficient to withstand a motion to dismiss." *Id.* at 42a. "In the context of parallel conduct claims, the basic requirement that plaintiffs must fulfill is to allege facts that, given the nature of the market, render the defendants' parallel conduct, and the resultant state of the market, suspicious enough to suggest that defendants are acting pursuant to a mutual agreement rather than their own individual self-interest." *Id.* at 46a. Such facts could "include evidence that the parallel behavior would have been against individual defendants' economic interests absent an agreement, or that defendants possessed a strong common motive to conspire." *Id.* at 41a-42a. "[O]n a motion to dismiss[,] the Court may properly draw these background assumptions only from the facts pleaded in the complaint and the relevant statute, and may

rely only on such background facts about the market and its history that are appropriate for judicial notice." *Id.* at 46a.

Plaintiffs failed to satisfy the applicable standard. With regard to plaintiffs' allegation that defendant ILECs conspired to keep CLECs out of their individual markets, plaintiffs explicitly conceded that "it is in each ILEC's individual economic interest to attempt to keep CLECs out of its market." *Id.* at 48a. While each defendant might gain certain benefits from *other* incumbents' efforts to exclude CLECs, "[n]o agreement would be necessary for all ILECs to be relatively certain to reap the alleged added benefits to be gained from parallel action" and "the motives that plaintiffs have proffered do not provide any basis to infer" that defendants' conduct was the result of agreement. *Id.* at 50a.

With regard to plaintiffs' allegation that defendants agreed not to expand meaningfully into each others' territories, the court noted that "geographic segregation . . . might be enough . . . to support an inference of conspiracy, in most industries, where one could view the defendants as non-monopolistic competitors who had . . . apparently arranged [the market] into a pattern of territorial fiefdoms." *Id.* at 47a. In this case, however, the Bell companies were "given monopolies in their respective territories" and were "prevented from [competing prior to 1996] by the entry barriers protecting each" company's territory. *Id.*

The court carefully reviewed the history of regulation, the terms of the statute, and the allegations of the complaint – particularly those describing the difficulties faced by new local service entrants – and concluded that "[f]or an ILEC to compete as a CLEC in an adjoining ILEC's territory would not be simply to extend their existing business into a neighboring region, but rather would be to invest in undertaking an entirely different kind of business." *Id.* at 57a. "Given the obstacles to becoming a successful CLEC, . . . [i]t is no more surprising, and raises no more inference of concerted action, that the ILECs have not gone into business as

CLECs than that they have all collectively failed to enter some other line of business." *Id.* The court thus held that, "[i]n light of the structure of the market as evidenced by the allegations in the Amended Complaint and the provisions of the 1996 Act, . . . it is apparent that this conduct is also attributable to defendants' individual economic interests, and therefore does not raise an inference of conspiracy." *Id.* at 51a.

D. The Court of Appeals' Opinion

The Second Circuit reversed, concluding that "the district court applied an incorrect standard for evaluating the defendants' motion to dismiss." Pet. App. 10a-11a. The court of appeals held that allegations of parallel conduct coupled with a bald assertion that the defendants were participants in a "conspiracy" are sufficient to state a claim under Section 1. Accordingly, the court of appeals said that it did not even need to address the district court's conclusion that the facts alleged in the complaint failed to support any inference that the alleged parallel conduct was the result of a conspiracy rather than independent action in each defendant's economic self-interest. *See id.*

The court of appeals acknowledged that "a bare bones statement of conspiracy . . . without any supporting facts permits dismissal." *Id.* at 16a (internal quotation marks omitted). And the court stated that "[t]he factual predicate that is pleaded does need to include conspiracy among the realm of plausible possibilities." *Id.* at 19a (footnote omitted). But the court held that "a pleading of facts indicating parallel conduct by the defendants can suffice to state a plausible claim of conspiracy." *Id.* at 25a. "[T]o rule that allegations of parallel anticompetitive conduct fail to support a plausible conspiracy claim," the court stated, "a court would have to conclude that there is *no set of facts* that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence." *Id.* (emphasis added). *See id.* at 10a-11a.

Accordingly, the court of appeals held that "plaintiffs have satisfied their burden at the pleading stage." *Id.* at 30a. Devoting approximately three pages of the 43-page slip opinion to the issue, the court concluded that, "[w]hile the amended complaint does not identify specific instances of conspiratorial conduct or communications, it does set forth the temporal and geographic parameters of the alleged illegal activity and the identities of the alleged key participants," by which the court of appeals meant only that the conspiracy was alleged to have begun "around the time the Telecommunications Act became law," that it allegedly affected the entire contintental United States, and that the "alleged key participants" were the named corporate defendants. *Id.* at 31a.

The court of appeals said it was "mindful that a balance is being struck here, that on one side of that balance is the sometimes colossal expense of undergoing discovery, that such costs themselves likely lead defendants to pay plaintiffs to settle what would ultimately be shown to be meritless claims, that the success of such meritless claims encourages others to be brought, and that the overall result may well be a burden on the courts and a deleterious effect on the manner in which and efficiency with which business is conducted." *Id.* at 30a. But the court held that, "[i]f that balance is to be recalibrated, . . . it is Congress or the Supreme Court that must do so." *Id.*

The Second Circuit denied rehearing on January 3, 2006. *See id.* at 59a-60a. The Court granted certiorari on June 26, 2006.

SUMMARY OF ARGUMENT

Rule 8 requires pleading of facts – not mere conclusory assertions – "showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). To state a claim for relief under Section 1 of the Sherman Act, a plaintiff must allege, first of all, that the defendants entered into a "contract, combination . . . or conspiracy" in restraint of trade. 15 U.S.C. § 1. Where, as here, a plaintiff alleges that the defendants have engaged in parallel conduct, and claims that the parallel conduct was the result of a conspiracy, a complaint is properly dismissed unless the facts alleged support, either directly or through a process of reasonable inference, the "conspiracy" conclusion.

I. A. The principles governing a district court's evaluation of a motion to dismiss for "failure to state a claim upon which relief can be granted," Fed. R. Civ. P. 12(b)(6), are settled and apply to this antitrust complaint. The court "must accept as true all the *factual* allegations in the complaint." *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993) (emphasis added). By the same token, the court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

Whether a complaint's factual allegations are sufficient to show that "the pleader is entitled to relief" must be judged in light of the substantive legal standards governing the claim. "[T]he appropriate level of generality for a pleading depends on the particular issue in question or the substantive context of the case before the court." 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1218, at 273 (3d ed. 2004) ("Wright & Miller"). What constitutes adequate allegations of fact depends on what "plaintiffs[] need to *prove*" to state a claim for relief. *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 346 (2005).

B. A complaint under Section 1 must include sufficient *factual* allegations to support the conclusion that the defendants conspired. A plaintiff may satisfy this requirement

either by making "direct allegations" sufficient to support a claim of conspiracy or by making "allegations from which an inference fairly may be drawn by the district court that evidence on these material points will be available and introduced at trial." 5 Wright & Miller § 1216, at 220-27. A bare assertion that defendants conspired, however, is not enough. *See DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53, 55, 56 (1st Cir. 1999) (Boudin, J.); *see also Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983) ("[A] district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.").

C. Where a plaintiff alleges parallel conduct and asserts, without additional supporting factual allegations, that such conduct is the result of conspiracy, the district court must determine whether the inference is warranted, taking all factual allegations as true and drawing all inferences from those facts favorably to the plaintiff. In drawing such inferences, the district court must be mindful of underlying substantive antitrust standards, which recognize that, in most circumstances, parallel conduct does *not* support an inference of conspiracy. What is required are factual allegations "'that tend[] to exclude the possibility' that the alleged conspirators acted independently." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)).

D. The standard articulated by the Second Circuit for judging the sufficiency of allegations of parallel conduct is incorrect. That collusion is one "plausible possibilit[y]" underlying parallel conduct does not mean that independent action is not also plausible, or even *more* plausible. The Second Circuit's mere-plausibility standard does not comport with the standard for antitrust conspiracy because it does not require facts that "'tend[] to exclude'" the possibility that defendants acted independently. *Matsushita*, 475 U.S. at 588 (quoting *Monsanto*, 465 U.S. at 764). Moreover, the Second

Circuit's focus on facts that a plaintiff may yet uncover, rather than on facts actually alleged in the complaint, violates a basic principle governing motions to dismiss. "It is not . . . proper to assume that the [plaintiff] can prove facts that it has not alleged." *Associated Gen. Contractors*, 459 U.S. at 526 & n.11.

II. The district court correctly dismissed the complaint for failure to state a claim. The complaint contained no direct factual allegations to support a claim that defendants conspireed. Instead, the complaint relied solely on the inferences to be drawn from two categories of allegedly parallel conduct: (1) inadequate assistance to CLECs and (2) failure to compete "meaningfully" in other territories as CLECs. Neither of these general allegations supports an inference of collusion.

A. The allegation that defendants failed to comply fully with the network-sharing obligations of the 1996 Act, *see* JA 23-24 (Am. Compl. ¶ 47), does not support an inference of collusion because there is an obvious unilateral explanation for the conduct, which the complaint's allegations did not tend to exclude. There is nothing suspicious from the point of view of antitrust law about an incumbent's alleged reluctance to facilitate CLECs' efforts to take away the incumbent's customers. Indeed, as this Court has recognized, the dealing with rivals that the 1996 Act requires is not something that an incumbent would ever "voluntarily" undertake. *Trinko*, 540 U.S. at 409; *see id.* at 410.

B. The allegation that defendants failed to compete "meaningfully" in each others' traditional local-service territories is likewise insufficient to support an inference of conspiracy. There are numerous unilateral explanations for decisions *not* to enter, or not to enter "meaningfully." Accordingly, "parallel decisions by business firms not to enter new markets" have no tendency to exclude such unilateral explanations. Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 307d, at 155 (Supp. 2006) ("Areeda & Hovenkamp");

see also 6 Areeda & Hovenkamp ¶ 1410c, at 64 (2d ed. 2003) (mutual failure of rivals to enter each others' territories not indicative of agreement).

This is particularly clear in this case. The allegations in the amended complaint themselves recognized that "being a CLEC in another ILEC's territory is an entirely different business than being an ILEC." Pet. App. 51a. While the incumbent carrier "controls and maintains . . . telecommunications infrastructure," new entrants are "dependent on [their] relationship with the local ILEC." *Id.* at 51a-52a. The profitability of the new entrant would therefore "depend in substantial part on the terms that can be negotiated with the ILEC . . . and whether the ILEC fulfills its obligations" (*id.* at 52a), which – according to plaintiffs' central allegation – the ILEC would resist doing.

Beyond this, the courts repeatedly vacated the UNE-P regime until the FCC finally eliminated it. The lack of regulatory certainty provided an additional reason not to pursue a strategy based on the UNE-P regime. Those facts – from plaintiffs' own complaint – demonstrate that a decision not to devote scarce resources to the risky enterprise of becoming a CLEC is perfectly rational and explicable on its own terms for each defendant acting entirely out of independently determined self-interest.

ARGUMENT

I. TO STATE A CLAIM UNDER SECTION 1, A PLAINTIFF MUST ALLEGE FACTS SUFFICIENT TO SUPPORT THE CONCLUSION THAT DEFENDANTS CONSPIRED

This Court's decisions establish two fundamental pleading rules that bear decisively on this case. First, a complaint must allege facts, not merely conclusions, that show the plaintiff is entitled to relief under the governing substantive law. Second, it is the facts alleged, not unalleged facts that the plaintiff might later prove, that must support the claim to relief. *See Associated Gen. Contractors*, 459 U.S. at 526 ("It is not . . . proper to assume that the [plaintiff] can prove facts that it has not alleged."); *Wilson v. Schnettler*, 365 U.S. 381, 383 (1961).

As applied to a Section 1 complaint, those requirements demand more than allegations of parallel conduct (which is legal and commonplace in our economy) plus the conclusory label "conspiracy." They demand facts that themselves tend to exclude the likelihood that the conduct was unilateral. *See Matsushita*, 475 U.S. at 588; *Monsanto*, 465 U.S. at 764. The Second Circuit incorrectly abandoned the requirement of such allegations and instead allowed costly litigation to proceed based merely on the possibility that unalleged facts might yet support the claim for relief. That decision is wrong as a matter of pleading law and harmful as a matter of antitrust policy.

A. Rule 8 Requires Pleading of Facts, Not Mere Conclusory Assertions, To Support a Plaintiff's Claim

Rule 8 requires that each "pleading which sets forth a claim for relief" must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). When a defendant files a motion pursuant to Rule 12(b)(6) to test the legal sufficiency of a pleading, courts distinguish between the *facts* alleged in the complaint – which must be accepted as true for purposes of evaluating

whether the complaint "state[s] a claim upon which relief can be granted," Fed. R. Civ. P. 12(b)(6); *see Leatherman*, 507 U.S. at 164 – and "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences," *Manufactured Home Communities Inc. v. City of San Jose*, 420 F.3d 1022, 1035 (9th Cir. 2005) (internal quotation marks omitted) – which need not be accepted.[1]

This distinction between well-pleaded facts, on the one hand, and conclusory assertions and inferences, on the other, is indispensable to enforce the requirement that a complaint "provide the defendant with 'fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Dura*, 544 U.S. at 346 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). As Judge Boudin explained in *DM Research*:

> [T]he price of entry, even to discovery, is for the plaintiff to allege a *factual* predicate concrete enough to warrant further proceedings, which may be costly and burdensome. Conclusory allegations in a complaint, if they stand alone, are a danger sign that the plaintiff is engaged in a fishing expedition.

170 F.3d at 55. As the Wright & Miller treatise explains, Rule 8's rejection of the detailed pleading of evidence required under the codes was not intended to eliminate the requirement that a complaint must contain factual allegations on "every material point necessary to sustain a recovery." 5 Wright & Miller § 1216, at 220-27. *See also* Brief of Mastercard International Inc. and Visa U.S.A. Inc. as *Amici Curiae* in Support of Petitioners at 4-9 (filed Aug. 25, 2006).

---

[1] *See also, e.g., Papasan*, 478 U.S. at 286; *Stachowski v. Town of Cicero*, 425 F.3d 1075, 1078 (7th Cir. 2005); *Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002) (court not required "to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences" or "allegations that contradict matters properly subject to judicial notice") (internal quotation marks omitted); *Dry v. United States*, 235 F.3d 1249, 1255 (10th Cir. 2000); *Doug Grant, Inc. v. Greate Bay Casino Corp.*, 232 F.3d 173, 184 (3d Cir. 2000); *In re Sofamor Danek Group, Inc.*, 123 F.3d 394, 400 (6th Cir. 1997).

Whether a complaint's allegations are sufficient under this standard must be judged in light of the substantive law governing the plaintiff's claim. "[T]he appropriate level of generality for a pleading depends on the particular issue in question or the substantive context of the case before the court." 5 Wright & Miller § 1218, at 273. This Court's decisions illustrate the application of this principle.

For example, the allegation that a defendant's conduct had an effect on interstate commerce sufficient to implicate the Sherman Act should rarely be controversial, because that requirement is not demanding. *See Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 331 (1991); *United States v. Employing Plasterers Ass'n of Chicago*, 347 U.S. 186, 189 (1954). By contrast, in a case where a plaintiff claims a violation of a constitutional right, this Court has required – under ordinary Rule 8 standards – factual allegations that are not merely conclusory. Thus, in *Papasan*, the plaintiffs alleged that they had been denied a "minimally adequate education," but the Court held that it was "not bound to credit and may disregard the allegation." 478 U.S. at 286. The Court noted:

> The petitioners do not allege that schoolchildren in the Chickasaw Counties are not taught to read or write; they do not allege that they receive no instruction on even the educational basics; they allege no actual facts in support of their assertion that they have been deprived of a minimally adequate education.

Id. Because such facts were critical to the resolution of the question whether the plaintiffs had a claim upon which relief could be granted, the Court would not assume their existence in the absence of a proper allegation.

Other recent cases illustrate the principle in a variety of contexts. For example, in *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006), the plaintiff alleged that the defendants' predicate acts were "directed at" and "directly injure[d]" the plaintiff. Joint Appendix at 16 (Compl. ¶ 49), *Anza v. Ideal Steel Supply Corp.*, No. 04-443 (U.S. filed Jan.

12, 2006); *see also, e.g.*, *id.* at 5 (Compl. ¶ 1) (plaintiff's lost business "direct effect" of challenged conduct); *id.* at 7 (Compl. ¶ 6) (scheme "directly injures" plaintiff). The Court disregarded these assertions in holding, on a motion to dismiss, that the complaint's allegations were insufficient to meet the direct-injury requirement for a claim under the RICO statute. Notwithstanding the plaintiff's conclusory assertion, the Court concluded that the factual allegations indicated that "[t]he *direct* victim of this conduct was the State of New York, not Ideal." *Anza*, 126 S. Ct. at 1997 (emphasis added). That conclusion was "confirmed by considering the directness requirement's underlying premises" – that is, "the difficulty that can arise when a court attempts to ascertain the damages caused by some remote action." *Id.*

In *Dura*, a unanimous Court similarly held insufficient, on a motion to dismiss, the plaintiffs' assertion that, as a result of the defendants' misrepresentations, the plaintiffs had "paid artificially inflated purchase prices" and were thereby "damage[d]." 544 U.S. at 347; *see also* Joint Appendix at 55a (Compl. ¶ 37), *Dura Pharms., Inc. v. Broudo*, No. 03-932 (U.S. filed Sept. 13, 2004) (alleging that "[p]ublic investors, who purchased Dura stock at prices inflated by the false representations . . . , have suffered millions in damages"). Applying Rule 8 standards, the Court held that the complaint's assertion failed in light of the requirement that a plaintiff seeking to recover for securities fraud must prove economic loss and proximate cause to recover. *See* 544 U.S. at 346 ("Our holding about plaintiffs' need to *prove* proximate causation and economic loss leads us also to conclude that the plaintiffs' complaint here failed adequately to *allege* these requirements."). The Court reasoned:

> [I]t should not prove burdensome for a plaintiff who has suffered an economic loss to provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind. At the same time, allowing a plaintiff to forgo giving any indication of the economic loss and proximate cause that the

> plaintiff has in mind would bring about harm of the very sort the statutes seek to avoid

– that is, litigation of groundless claims. *Id.* at 347; *see also* Areeda & Hovenkamp ¶ 307, at 156 n.17 ("*Dura* itself . . . was applying ordinary, not heightened, pleading rules.").

And, in *Trinko*, likewise decided on a motion to dismiss, the Court similarly held the required exclusionary-conduct allegation to be legally insufficient, notwithstanding the plaintiff's assertion that the defendant's failure to provide adequate access to network facilities had "no valid business reason" and constituted "exclusionary and anticompetitive behavior." Joint Appendix at 46, 47 (Am. Compl. ¶¶ 52, 57), *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, No. 02-682 (U.S. filed May 23, 2003) ("*Trinko* JA"). Instead, the Court looked to the complaint's *factual* allegations and took judicial notice of certain obvious facts, including that "unbundled elements . . . exist only deep within the bowels of Verizon; [and that] they are brought out on compulsion of the 1996 Act and offered not to consumers but to rivals, and at considerable expense and effort." *Trinko*, 540 U.S. at 410. It then concluded that an alleged refusal to deal in these circumstances did not state a claim under Section 2 of the Sherman Act.

B. A Conclusory Allegation of "Conspiracy" Is Insufficient To State a Claim Under Section 1

1. In this case, the governing antitrust law required that plaintiffs allege facts sufficient to support the conclusion that the conduct alleged was the result of a conspiracy. *Trinko* establishes that a unilateral failure to share network elements, as required by the 1996 Act, does not violate the antitrust laws. Nor, of course, would a unilateral decision not to enter a particular market. The existence of a conspiracy – the element of agreement – is a critical element in distinguishing between lawful and potentially unlawful conduct.

In this legal context, the lower courts have rightly insisted that plaintiffs do more than make "bare bones" averments of conspiracy. *Heart Disease Research Found. v. General Motors Corp.*, 463 F.2d 98, 100 (2d Cir. 1972); *see also Tal v. Hogan*, 453 F.3d 1244, 1261 (10th Cir. 2006); *DM Research*, 170 F.3d at 55-56; *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 221 (4th Cir. 1994); *Lombard's, Inc. v. Prince Mfg., Inc.*, 753 F.2d 974, 975 (11th Cir. 1985). *See generally* Christopher M. Fairman, *The Myth of Notice Pleading*, 45 Ariz. L. Rev. 987, 1036 (2003) (noting a judicial "consensus" under which "[c]onclusory allegations [of conspiracy] are consistently rejected").

A pleading of conspiracy requires factual allegations that directly support the existence of an agreement or, failing that, facts that support an inference that defendants conspired. *See* 5 Wright & Miller § 1216, at 220-27. As the First Circuit held in affirming dismissal of a Section 1 claim:

> [T]erms like "conspiracy," or even "agreement," are border-line: they might well be sufficient in conjunction with a more specific allegation – for example, identifying a written agreement or even a basis for inferring a tacit agreement – but a court is not required to accept such terms as a sufficient basis for a complaint.

DM Research, 170 F.3d at 56 (citation omitted).

Drawing the line between a conclusory allegation and a factual allegation requires exercise of sound judicial judgment. As this Court has held, Rule 8 and Rule 12 preserve courts' power "to insist upon some specificity in pleading." *Associated Gen. Contractors*, 459 U.S. at 528 n.17; *see also Dura*, 544 U.S. at 347 (failing to require adequate factual allegations "would permit a plaintiff 'with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the [discovery] process will reveal relevant evi-

dence'") (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975)) (alteration added by *Dura* Court); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979) (encouraging district courts to "use the tools available" to avoid "administrative chaos, class-action harassment, or 'windfall' settlements"); *Davis v. Passman*, 442 U.S. 228, 238 n.15 (1979) ("It is not enough to indicate merely that the plaintiff has a grievance but sufficient detail must be given so that the defendant, and the court, can obtain a fair idea of what the plaintiff is complaining, and can see that there is some legal basis for recovery") (internal quotation marks omitted).

2. The Court's decision in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), does not require a district court to accept a conclusory allegation of antitrust conspiracy without supporting facts. The Court there reversed dismissal of the plaintiff's claim of employment discrimination, noting that the complaint "detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved." *Id.* at 514. The contested issue was not whether the plaintiff had sufficiently pleaded the required conduct; rather, the Court held that the lower courts erred by requiring that the plaintiff go beyond his plain allegation that he was fired "on account of" his age and national origin ("motivating factors"), Joint Appendix at 25a, 27a (Am. Compl. ¶¶ 20, 37), *Swierkiewicz v. Sorema N.A.*, No. 00-1853 (U.S. filed Nov. 16, 2001), and present facts to make out a *prima facie* case of discrimination under the optional framework for presenting and evaluating evidence laid out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). This Court rejected the requirement, noting that "the *McDonnell Douglas* framework does not apply in every employment discrimination case," and that the plaintiff might be able to provide "direct evidence of discrimination." *Swierkiewicz*, 534 U.S. at 511.

The allegation of "conspiracy," without any facts suggestive of it, presents a critically different problem from the allegation of discriminatory motive in the context of the

specific facts alleged in *Swierkiewicz*. Indeed, plaintiffs themselves, like the Second Circuit (Pet. App. 16a), admitted that a naked "conspiracy" allegation would *not* suffice. *See* JA 94-95 (Dist. Ct. 8/1/03 Tr. 21). Unlike the charge of discriminatory motive in *Swierkiewicz* (about a specific firing of a specific employee), the "conspiracy" label here adds nothing to the underlying factual allegations about parallel conduct. The problem is not failure to reveal the evidentiary basis for a legally sufficient factual allegation. It is that, without flesh on the bare bones, an assertion of conspiracy fails to reveal a factual predicate sufficient to satisfy Rule 8 standards.

This inquiry into the adequacy of a complaint's allegations of antitrust conspiracy cannot be side-stepped by positing that a plaintiff might (despite the absence of direct or inferential factual allegations) be able to prove conspiracy after discovery. *Cf.* Pet. App. 26a; *see also infra* pp. 28-29. That is simply to argue that, despite the failure to "show that the 'pleader is entitled to relief'" – the standard under Rule 8 – a complaint should be permitted to proceed so long as a plaintiff claims that "there is 'reason to believe that, upon evidence which may be disclosed by discovery, the pleader may be entitled to relief.'" Fleming James, Jr., *et al.*, *Civil Procedure* § 3.6, at 189 (5th ed. 2001). Rule 8 forecloses that argument.

C. When a Complaint Alleges Conspiracy Based on Parallel Conduct, the Factual Allegations Must Support an Inference that the Defendants Conspired

1. Substantive antitrust law draws a sharp distinction between concerted action prohibited by Section 1 and parallel but unilateral conduct, which Section 1 does not address. "[T]his Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense." *Theatre Enters., Inc. v. Paramount Film Distrib.*

Corp., 346 U.S. 537, 541 (1954). *See also Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993)

Accordingly, allegations of parallel conduct cannot by themselves satisfy the agreement element of Section 1. Parallel conduct is to be expected when similarly situated competitors react to comparable market conditions. Accordingly, to state a claim for relief, it is not enough for a plaintiff to allege that defendants engaged in parallel conduct; there must be sufficient *factual* allegations to support the conclusion that defendants conspired. As the district court correctly held, the pleaded facts must allow the court to "distinguish between conduct that represents the natural convergence of competitors' market behavior, and conduct that appears to have been taken pursuant to an agreement." Pet. App. 41a.

In drawing that distinction, the district court properly relied on the basic principle articulated in *Matsushita* and *Monsanto* that "a plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Matsushita*, 475 U.S. at 588 (quoting *Monsanto*, 465 U.S. at 764). As the courts of appeals have uniformly held in evaluating claims of horizontal conspiracy, such allegations must tend to show "that the defendants' behavior would not be reasonable or explicable (i.e., not in their legitimate economic self-interest) if they were not conspiring to fix prices or otherwise restrain trade." *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1301 (11th Cir. 2003) (internal quotation marks omitted); *see, e.g., In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360-61 (3d Cir. 2004), *cert. denied*, 544 U.S. 948 (2005); *Viazis v. American Ass'n of Orthodontists*, 314 F.3d 758, 762, 764 (5th Cir. 2002); *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1033 (8th Cir. 2000) (en banc); *In re Citric Acid Litig.*, 191 F.3d 1090, 1100 (9th Cir. 1999); *In re Brand Name Prescription Drugs Antitrust Litig.*, 186 F.3d 781, 787-88 (7th Cir. 1999) (Posner, J.); *see also Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 936 (7th Cir.

2000). A complaint that seeks to state a claim under Section 1 where the only facts alleged describe parallel conduct and attendant market circumstances must – taking the alleged facts as true and drawing all inferences favorable to the plaintiff – meet this "tends-to-exclude" standard. *See, e.g., Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1361 (10th Cir. 1989). This is the standard that the district court applied. *See* Pet. App. 46a.

Requiring allegations that support an inference that defendants acted against their self-interest, but for the existence of an agreement, reflects both basic antitrust logic and important policy concerns. If defendants acted in their individual self-interest, then there is no reason, based simply on parallel conduct, to infer the existence of such an agreement. *See First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 279-80 (1968); *Matsushita*, 475 U.S. at 587 (where defendant's "refusal to deal was consistent with the defendant's independent interest, the refusal to deal could not by itself support a finding of antitrust liability").

Furthermore, to allow a plaintiff to plead a claim under Section 1 based on parallel conduct – without supporting facts tending to exclude the possibility of independent action – would be to subject a defendant to litigation for alleged conduct that is consistent with legitimate business judgment, placing a heavy tax on ordinary business activity. *See* Brief of *Amici Curiae* Economists in Support of Petitioners at 16-18 (filed Aug. 25, 2006). To allow too-easy inference of conspiracy based on parallel conduct would "deter or penalize perfectly legitimate conduct" and hence "both inhibit management's exercise of independent business judgment and emasculate the terms of the statute." *Monsanto*, 465 U.S. at 763-64 (internal quotation marks omitted).

2. While *Matsushita* was decided on summary judgment, the standard that Judge Lynch applied comports with the proper function of a motion to dismiss.

The critical difference is the most obvious one: on a motion to dismiss, a complaint's factual allegations are accepted as true and defendants may introduce only judicially noticeable facts in their defense. *See Leatherman*, 507 U.S. at 164. By contrast, on summary judgment, the plaintiff must point to "sufficient *evidence* supporting the claimed factual dispute . . . to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (emphasis added; internal quotation marks omitted). The purpose of a motion for summary judgment is thus to test the sufficiency of the plaintiff's evidence. The purpose of the motion to dismiss, by contrast, is to determine whether – accepting the allegations of the complaint as true – the plaintiff has a legally cognizable claim that justifies starting the expensive machinery of litigation.

Courts have rightly insisted upon the importance of summary judgment as a mechanism to promote judicial efficiency. But the observation applies with even greater force where a complaint fails to establish a legally cognizable basis for a claim, even taking its factual allegations as true. The court of appeals acknowledged the "well-founded concern" about "condemn[ing] defendants to potentially limitless 'fishing expeditions' – discovery pursued just 'in case anything turn[s] up' – in hopes, perhaps, of a favorable settlement in any event." Pet. App. 27a (footnotes omitted; second alteration in original); *see also* 6 James Wm. Moore, *et al.*, *Moore's Federal Practice* ¶ 26.46[1], at 26-146.24 (3d ed. 2003) ("antitrust cases have become known as 'serpentine labyrinths' in which discovery is a 'bottomless pit' "). There is no justification for allowing such litigation to proceed where a complaint has failed to provide a factual basis for any claim for relief. *See also* Brief of the Chamber of Commerce of the United States of America, *et al.*, as *Amici Curiae* in Support of Petitioners at 18-26 (filed Aug. 25, 2006).

The Federal Rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. Proper application of substantive antitrust standards and the requirement that plaintiffs plead facts sufficient to make out a legally cognizable claim serve this overriding goal.

D. The Second Circuit's Standard, Which Assumes the Existence of Facts Not Alleged, Is Inconsistent with Rule 8 and Substantive Antitrust Standards

The Second Circuit's standard for judging the sufficiency of a complaint conflicts with the Rule 8 principles and substantive antitrust law requirements set forth above.

The court began by holding that, at the pleading stage, a plaintiff "must allege only the existence of a conspiracy and a sufficient supporting factual predicate on which that allegation is based." Pet. App. 25a. But, in giving content to the latter requirement, the court held that such a factual predicate would merely need to "include conspiracy among the realm of 'plausible' possibilities." *Id.* And, in the specific context of parallel-conduct allegations, the court held that such allegations are insufficient only when "there is *no set of facts* that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence." *Id.* (emphasis added).

The court's holding is erroneous in two basic respects. First, it is inconsistent with the basic antitrust principle that parallel conduct provides no basis for inferring a conspiracy unless it tends to exclude the possibility of independent action. As the court itself recognized, a bare allegation of conspiracy, without supporting facts, is insufficient. Adding allegations of parallel conduct does not show that the plaintiff is entitled to relief, because parallel conduct is not unlawful or generally even suggestive of agreement. Instead, the allegations must support an inference of conspiracy under the applicable legal standard, which requires that the facts tend to exclude independent action as an equally likely (or even

more likely) explanation. The Second Circuit's standard, by contrast, would almost never permit dismissal of allegations of parallel conduct. It is almost never true that there is "no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion," because it is almost always possible that parties agreed, no matter how improbable such an agreement might be. *See DM Research*, 170 F.3d at 57.

Second, the court's standard is inconsistent with the principle of pleading law that "[i]t is not . . . proper to assume that the [plaintiff] can prove *facts that it has not alleged*." *Associated Gen. Contractors*, 459 U.S. at 526 & n.11 (emphasis added). It is true, as the Second Circuit suggested, that a plaintiff might nevertheless prove the existence of an improbable conspiracy through "direct[]" proof. Pet. App. 26a. But that suggestion, relying entirely on what *might* ultimately be "prove[d]," effectively wipes away any requirement that the complaint actually *allege* sufficient facts to state a claim. The Second Circuit has thus done precisely what this Court held is improper: it has allowed the complaint to proceed because collusion is a "'plausible' possibilit[y]" based on a "set of facts" *not* alleged. *Id.* at 25a.

Nor is the Second Circuit's decision consistent with *Conley*, despite the court's borrowing of the "no set of facts" language from that opinion. The Court's statement in *Conley* that a complaint should not be dismissed unless there is "no set of facts" that a plaintiff could prove in support of his claim does not mean that a court must hypothesize unalleged facts. *See, e.g.*, *Wilson*, 365 U.S. at 383 ("[i]n the absence of . . . an allegation [that the arrest was made without probable cause] the courts below could not, nor can we, assume that respondents arrested petitioner without probable cause"). That language means, instead, that, if a complaint's allegations make out a violation of a legal duty, neither the failure to identify the duty with particularity nor the possibility of defenses will defeat a claim. *See Conley*, 355 U.S. at 46-47. The Court *later* addressed the question whether the complaint

set forth sufficiently "*specific* facts" in support of its "general allegations of discrimination." *Id.* at 47 (emphasis added). And it held – much as the Court did in *Swierkiewicz* – that an allegation that the union had failed to represent the plaintiffs because of their race under specifically alleged circumstances was sufficient to place the defendants on notice of both the claim and its factual basis. *See id.* The allegations here do not meet that standard.

II. THE COMPLAINT'S ALLEGATIONS FAIL TO SUPPORT AN INFERENCE OF CONSPIRACY UNDER THE PROPER LEGAL STANDARD

Plaintiffs sought to allege an agreement in restraint of trade not directly – by identifying collusive communications (in-person, written, electronic, or otherwise) or actions – but instead by specifying parallel marketplace conduct from which they seek an inference of agreement. The complaint is devoid of specifics regarding the participants, the time period, the terms of the agreement, the mechanism of enforcement, or any other facts that would permit defendants to investigate and defend against the charge. Instead, the allegation of conspiracy rests on "the absence of any meaningful competition between the [defendants] in one another's markets" and "the parallel course of conduct that each engaged in to prevent competition." JA 27 (Am. Compl. ¶ 51). Indeed, plaintiffs below implicitly disclaimed having made any "direct" allegations of conspiracy. Reply Brief for Plaintiffs-Appellants at 6 (2d Cir. filed May 26, 2004) ("2d Cir. Reply Br."). *See also* Pet. App. 31a ("the amended complaint does not identify specific instances of conspiratorial conduct or communications"). Plaintiffs instead relied solely on inferential or "circumstantial" allegations. 2d Cir. Reply Br. at 6. As a matter of basic pleading law, however, the district court was not required to accept such inferences.

The "presumption of antitrust conspiracy law" is "that the inference of a conspiracy is always unreasonable when it is based solely on parallel behavior that can be explained as the

result of the independent business judgment of the defendants." *Southway Theatres, Inc. v. Georgia Theatre Co.*, 672 F.2d 485, 494 (5th Cir. 1982). It makes perfect sense for an ILEC not to cooperate with CLECs seeking to take away its customers (as alleged), quite apart from whether other ILECs follow suit. Nor is there anything suspicious about an ILEC's failure to enter new markets as a CLEC in its own right (as alleged), where it would be dependent upon a vanishing scheme of regulatory subsidies. When there is an evident, common-sense unilateral explanation for the conduct as fully described in the complaint, and no allegations of furtive meetings, suspicious communications, or the like, the complaint does not state a claim of conspiracy.

A. The Claim that ILECs Resisted Costly and Burdensome Network-Sharing Duties Does Not Support an Inference of Conspiracy

The complaint's allegation that each defendant resisted CLEC efforts to take away customers using the ILEC's own facilities is perfectly consistent with the unilateral business interest of each defendant. Indeed, plaintiffs expressly conceded before the district court "that it is in each ILEC's individual economic interest to attempt to keep CLECs out of its market." Pet. App. 48a (citing Dist. Ct. 8/1/03 Tr. 29 (JA 98)). Moreover, the only parallel conduct alleged – "fail[ure] to provide the same quality of service to competitors that Defendants provide to their own retail customers"; "fail[ure] to provide access to operational support systems . . . on a nondiscriminatory basis"; "undue delays in the provisioning of unbundled elements"; and so on, JA 23-24 (Am. Compl. ¶ 47) – is the exact same conduct that provided the basis for plaintiff Twombly's earlier claim that one of the defendants had violated *Section 2*. In that case, the allegation was that such behavior enabled the ILEC to maintain a profitable monopoly. Plaintiffs (and counsel) thus effectively conceded there, too, that the alleged conduct serves the independent business interest of each defendant.

The basis for this unilateral interest is simple, and confirmed by plaintiffs' complaint and this Court's decisions. Plaintiffs expressly alleged that, had any ILEC cooperated with CLECs, entry would have been rapid and customers would have been lost to CLEC rivals. *See* JA 26-27 (Am. Compl. ¶ 50). The very purpose of the sharing obligations imposed by the 1996 Act was to "eliminate the monopolies enjoyed by the inheritors of AT&T's local franchises" by providing competitors access to the incumbent's network at cut-rate prices. *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 476 (2002). As this Court recognized in *Trinko*, any rational competitor – all other things being equal – would prefer to sell directly to end customers at full retail prices, *see* 540 U.S. at 409; and, even if no customers were lost, it would prefer to reduce the substantial expenditures that the 1996 Act imposed, *see id.* at 410. There is, in short, a unilateral explanation for the conduct alleged that is obvious on the face of the complaint.

The complaint does nothing to exclude that explanation when it postulates that defendants had "compelling common motivations to . . . agree[]" not to cooperate with CLECs because "greater competitive inroads" into one defendant's territory would have "enhanced the likelihood that such a CLEC might present a competitive threat in other Defendants' territories as well" and "would have revealed the degree to which competitive entry by CLECs would have been successful." JA 26-27 (Am. Compl. ¶ 50). There are two decisive problems with reliance on this allegation as tending to exclude the possibility of unilateral conduct.

First, this allegation at most hypothesizes a possible advantage from agreement (while wholly ignoring the countervailing legal risks).[2] The possibility of benefits from agreement

---

[2] One could always hypothesize *some* reason that agreement with competitors would bring some incremental advantage (reducing uncertainty concerning rivals' actions can always reduce downside risks), but that does not undermine the conclusion that the conduct is in the defendants'

does not logically – and thus cannot legally – tend to exclude a unilateral explanation evident from the complaint itself. Here, in particular, the hypothesized advantages from agreement are not only speculative and indirect, but actually depend upon the premise that each ILEC has a strong, independent reason to block in-region entry in its own territory. As the district court correctly observed, "[t]he asserted motivations to make an agreement . . . are not considerations that would affect [an ILEC's] initial decision as to whether or not to fight the CLECs in its own market." Pet. App. 49a. That alleged decision remains fully explained in unilateral terms.[3]

Second, and in any event, the asserted motivation to conspire is itself undercut by the evident lack of *need* to have any agreement to achieve the postulated benefit. As the district court explained, each defendant "could rationally expect that each of [the others] will reach the same conclusion . . . . No agreement would be necessary for all ILECs to be relatively certain to reap the alleged added benefits to be gained" from other defendants' comparable course of conduct. *Id.* at 49a-50a. The complaint, in short, does nothing to tend to exclude the unilateral explanation for the alleged anti-CLEC conduct – or, therefore, to support an inference of conspiracy.

---

individual interest *absent* agreement. *See, e.g., Serfecz v. Jewel Food Stores*, 67 F.3d 591, 600-01 (7th Cir. 1995) ("The mere existence of mutual economic advantage, by itself, does not tend to exclude the possibility of independent, legitimate action and supplies no basis for inferring a conspiracy.").

[3] The complaint did not even allege that defendants followed *the same* non-compliance strategies; rather, the complaint very generally alleged that each of the defendants engaged in "one or more" of 12 categories of conduct, each described in vague terms. Thus, for all that appears in the complaint, each defendant was engaged in *different* (not parallel) conduct in its allegedly inadequate cooperation with CLECs.

B. The Claim that ILECs Did Not Meaningfully Enter Each Others' Traditional Service Territories Does Not Support an Inference of Conspiracy

The facts alleged in the complaint likewise fail to raise an inference, or suspicion, that an ILEC's alleged failure to compete "meaningfully" in the territory of another ILEC is attributable to anything but unilateral business judgment. Indeed, the facts alleged positively undermine any such inference.

Firms have multiple demands on scarce capital, new entry is always risky, and a firm can exploit only a small fraction of available opportunities. Where, as a result of historical accident or deliberate design, two firms operate in adjacent territories, the failure of one to compete in the other's region does not support an inference of agreement. As stated in the leading antitrust treatise, that would be true, even if each firm's decision depends in part on the possibility of retaliatory entry. *See* 6 Areeda & Hovenkamp ¶ 1410c, at 64 (failure of rivals to "sell in the other's area although each is capable of doing so" does not support inference of agreement).[4]

The inherent uncertainty of new entry is reflected in the rule of antitrust law that a plaintiff that claims to be a potential entrant is denied antitrust standing to challenge exclusionary conduct *unless* the plaintiff has taken "actual and

---

[4] As this Court noted in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), even where firms consciously act in parallel ways "by recognizing their shared economic interests," that process is "not in itself unlawful." *Id.* at 227; *see also Theatre Enters.*, 346 U.S. at 541; 6 Areeda & Hovenkamp ¶ 1433a, at 236 ("The courts are nearly unanimous in saying that mere interdependent parallelism does not establish the contract, combination, or conspiracy required by Sherman Act § 1."). Thus, even if each ILEC consciously decided not to invade its neighbor's territory, in order not to provoke retaliatory entry, there would be no reason to infer an unlawful agreement. That is particularly true here, where, as discussed below, the complaint itself acknowledged ample independent reasons for each ILEC to forgo such entry.

substantial affirmative steps toward entry, such as the consummation of relevant contracts and procurement of necessary facilities and equipment." *Andrx Pharms., Inc. v. Biovail Corp.*, 256 F.3d 799, 807 (D.C. Cir. 2001) (internal quotation marks omitted); *see also, e.g., In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 11 F.3d 1460, 1465 (9th Cir. 1993); *Out Front Productions, Inc. v. Magid*, 748 F.2d 166, 170 (3d Cir. 1984). That venerable limitation on standing makes sense precisely because it is so well understood that a variety of factors – not least the availability of more attractive opportunities elsewhere – may lead a firm to pass up what may appear to others to be a potentially profitable new venture. And that limitation underscores the inappropriateness of inferring agreement from the type of parallel *in*action alleged here.

Such an inference is particularly unwarranted in light of the facts that plaintiffs *did* allege – allegations that the district court properly took into account in determining whether the complaint stated a claim. *See, e.g., Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 481 (1999); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547 (1985). As alleged in the complaint, there are fundamental differences between providing telephone service over a company's own network – as ILECs do – and reselling the communications infrastructure of another company – as CLECs are alleged to do. *See* JA 26 (Am. Compl. ¶ 47(*l*)). This makes the decision to enter new territory as a CLEC akin to a decision to undertake a new (if related) business activity, not merely to expand existing activities. *See* Pet. App. 51a, 54a. The alleged fact of dependence on the ILEC – and the knowledge that the ILEC has the means to limit entry – provides a fully adequate explanation of defendants' alleged refusal to embrace the CLEC opportunity.

Furthermore, the complaint itself admits that the UNE-P regime – upon which defendants allegedly had an incentive to rely – was subject to judicial review throughout the period. *See* JA 19 (Am. Compl. ¶ 35). The courts made it clear that

the UNE-P was on a shaky foundation from the start, and it was kept in place only temporarily between judicial vacaturs. It is hardly surprising that an individual defendant would make an independent business and legal judgment not to rely on an unstable regulatory regime, particularly a regime that it was itself challenging in the courts as unlawful.

The allegation that ILEC-as-CLEC entry was "an especially attractive business opportunity" in areas where one ILEC serves territories that border (or surround) the territory of another (JA 21 (Am. Compl. ¶ 40)) does not support the required inference of conspiracy. That allegation is by its terms deficient: it does *not* say that the nearby-entry opportunity is *more attractive than other business opportunities*. The allegation thus does not make the minimally necessary claim, namely, that defendants were acting against independent self-interest. The distinction between what plaintiffs alleged and what would be minimally necessary is critical. "Firms do not expand without limit and none of them enters every market that an outside observer might regard as profitable, or even a small portion of such markets." Areeda & Hovenkamp ¶ 307, at 155 (criticizing Second Circuit decision at issue here). Unless an ILEC judged the UNE-P opportunity to be the *best* use of scarce capital in the long-run – which the complaint did *not* allege – failure to pursue the opportunity entails no sacrifice and hence is not suggestive of anything but unilateral decisionmaking. *See* 6 Areeda & Hovenkamp ¶ 1415e, at 99-100 ("One must not characterize a firm's sacrifice of short-run interest in favor of long-run interest as contrary to its self-interest.").

In any event, the assertion that the ILEC-as-CLEC opportunity was "especially attractive" is merely an inference or characterization – and one that is contradicted by the complaint's factual allegations. *See Trinko*, 540 U.S. at 410 (refusing to accept plaintiff's assertion that failure to provide access to network facilities had "no valid business reason," *Trinko* JA at 47 (Am. Compl. ¶ 57)). The complaint here admitted that ILECs, as new entrants, would face substantial

obstacles, because each ILEC "possess[es] the *exclusive and sole source of entry into its own local telephone . . . market.*" JA 26 (Am. Compl. ¶ 47(*l*)) (emphasis added). Moreover, "being a CLEC is an extraordinarily difficult enterprise" because "ILECs have been obstructionist i[n] providing CLECs with the tools necessary to engage in business." Pet. App. 54a. As alleged in the complaint, "the ILEC-as-CLEC is no different from any other CLEC" with regard to these factors. *Id.*

Plaintiffs cite the statement of Qwest CEO Richard Notebaert – who said that competing as a CLEC "'might be a good way to turn a quick dollar but that doesn't make it right,'" JA 22 (Am. Compl. ¶ 42) – as support for the claim that competition as a CLEC presented an attractive business opportunity. As the district court rightly observed, Mr. Notebaert's statements "suggest only that he did not consider becoming a CLEC to be a sound long-term business plan" because "the legal landscape in which CLECs operate could have changed at any time." Pet. App. 56a.[5] In fact, that prediction was borne out: the UNE-P regime is long gone, and those CLECs that invested in UNE-P competition have seen that business model go into steep decline. *See supra* pp. 4-5.

---

[5] Later in the same article quoted by plaintiffs, Mr. Notebaert, while discussing the regulatory regime that requires incumbent firms to sell network elements to rivals at wholesale prices, is quoted as saying: "'I don't think it's a sustainable economic model.' . . . 'It's just a nuts pricing model.'" Jon Van, *Ameritech Customers Off Limits: Notabaert*, Chi. Trib., Oct. 31, 2002, at Business p.1 (JA 42). Moreover, another article cited in the complaint confirms that Mr. Notebaert believed that the relevant FCC rules would be "revised next year" and that it would be "*unwise* to base a business plan" on their continuation. Jon Van, *Lawmakers Seek Probe of Bells: Do Firms Agree Not To Compete?*, Chi. Trib., Dec. 19, 2002, at Business p.2 (emphasis added) (JA 44). A court assessing the sufficiency of a complaint properly considers all "documents appended to the complaint or incorporated in the complaint by reference." *Allen v. WestPoint-Pepperell, Inc.*, 945 F.2d 40, 44 (2d Cir. 1991); *see also Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th Cir. 1994).

Even if the complaint could be read to allege that entry into a neighboring territory as a CLEC was the most profitable opportunity available to ILECs – which it cannot – this allegation still would not support any inference of conspiracy. As alleged in the complaint, the existing "allocation" of markets by geographic territory is not the result of any cartel agreement, but instead reflects the history of telecommunications regulation, in which each of the Bell companies was given a monopoly in its respective territory in 1982, monopolies that were largely maintained by state regulation until 1996. *See* JA 16-17, 18 (¶¶ 23, 27). Thus, no concerted action was required to establish exclusive territories.[6]

Moreover, once those exclusive territories were established, "[i]f one of the Defendants had broken ranks and commenced competition in another's territory the others would quickly have discovered that fact." JA 26 (Am. Compl. ¶ 49). Plaintiffs stated in their complaint that "[t]he likely immediacy of such discovery" makes a territorial allocation agreement "more probable." *Id.* In fact, given that territories were already established, and given the allegation that entry would provoke retaliation, the fact that secret entry would be impossible makes unlawful collusion superfluous and therefore *im*probable. *See* 6 Areeda & Hovenkamp ¶ 1425e5, at 182-83 (identical interruptions of an established

---

[6] The complaint noted that "[e]laborate communications . . . would not have been necessary in order to enable Defendants to agree to allocate territories." JA 26 (Am. Compl. ¶ 48). In fact, extremely elaborate communications *were* required – litigation of a major antitrust case and negotiation of the ensuing consent decree – but those communications were entirely lawful. So, too, are communications through the various trade organizations and standards-setting bodies cited in the complaint, *see* JA 23 (Am. Compl. ¶ 46), which are an inevitable feature of an industry in which all participants are required to interconnect with one another and maintain a nationwide communications network. *See* 47 U.S.C. § 251. There is nothing suspicious about the existence of such communications. *Cf., e.g., AD/SAT, Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 233-34 (2d Cir. 1999) (per curiam) (rejecting a "'walking conspiracy' theory" of participation in trade associations).

course of dealing, following meetings, may support an inference of conspiracy, but a "mere failure to expand or to solicit a rival's customers" does not). As noted above, *see supra* note 4, conscious mutual forbearance, even if properly alleged, would not suffice to support an inference of agreement.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for reinstatement of the judgment of the district court dismissing the complaint.

(24) Filedate: OCT 13 2006

No. 05-1126

IN THE

Supreme Court of the United States

BELL ATLANTIC CORPORATION, *et al.*,

Petitioners,

v.

WILLIAM TWOMBLY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

MARC A. TOPAZ
JOSEPH H. MELTZER
SCHIFFRIN & BARROWAY, LLP
280 King of Prussia Road
Radnor, PA 19087
(610) 667-7706

J. DOUGLAS RICHARDS
Counsel of Record
MICHAEL M. BUCHMAN
MILBERG WEISS BERSHAD
& SCHULMAN LLP
One Pennsylvania Plaza
New York, NY 10119-0165
(212) 594-5300

Attorneys for Respondents

204045

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
Table of Cited Authorities	iv
Summary of the Argument	1
Argument	5
I. Petitioners' Proposal To Reduce Discovery Burdens By Erecting Heightened Persuasiveness And Specificity Requirements For Antitrust Conspiracy Claims Would Be Inappropriately Considered On A Petition For Certiorari, And Should Be Considered, If At All, Only In Rulemaking Or Legislation.	5
II. Even If Properly Considered Here, Petitioners' Proposal Is Ill-Advised, And Has Not Been Supported By Even A Minimal Showing That "Nuisance Suits" For Antitrust Conspiracy Are Common.	11
III. The Diverse Legal Standards Proposed By Petitioners And Their Amici Conflict With Bedrock Pleading Standards Under Rule 12 (b)(6).	17
A. A Rule 12 (b)(6) motion must be denied if it appears that "any set of facts" would justify recovery.	17
B. Pleading standards are especially relaxed as to matters, like conspiracy, that are "peculiarly within the opposing party's knowledge."	22

Contents

Page

C. Petitioners' argument that their proposed heightened pleading standard merely reflects "complexity of the underlying substantive law" already has been rejected in principle by the Court. 23

D. Burdens of undue discovery are better managed in other ways than through *ad hoc* judicial "heightened pleading requirements." 25

E. Petitioners' radical proposal, to apply *Matsushita* on a Rule 12 (b)(6) motion, is utterly inconsistent with the Court's precedents. 26

F. The less radical proposal made by the Solicitor General also conflicts with the Court's precedents. 29

1. As to persuasiveness, only a reasonable *possibility* of wrongful conduct is necessary. 29

2. Simple and concise factual allegations cannot properly be ignored on the basis that they are "conclusory." 31

G. The supposed "parallel conduct is enough" standard that Petitioners' amici posit is a mere straw man, and any standard that hinges on whether conduct might be called "parallel" would be inappropriate. 35

Contents

Page

H. To adopt any standard that hinges on whether "plus factors" have been pleaded also would be inappropriate. 38

IV. The Allegations In This Case Satisfy Rule 12(b)(6). 39

A. The allegations made here amply satisfy *Conley*. 39

B. The arguments being offered to attack Respondents' allegations are themselves seriously flawed. 40

1. This case was not begun to circumvent the Court's decision in *Trinko*. 40

2. The District Court's analysis failed to accept Respondents' allegations as true. 43

3. Petitioners and their amici fail to construe the complaint liberally. 46

4. Petitioners and their amici ignore simple and concise factual allegations as "conclusory." 47

5. Petitioners ignore the teaching of *Continental Ore*. 48

Conclusion 50

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

Altieri v. Albany Public Library,
No. 05-3638-cv, 2006 U.S. App. LEXIS 2725
(2d Cir. Feb. 1, 2006) 38

Andrx Pharm., Inc. v. Elan Corp.,
421 F.3d 1227 (11th Cir. 2005) 8

Anza v. Ideal Steel Supply Corp.,
126 S. Ct. 1991 (2006) 32, 43

Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters,
459 U.S. 519 (1983) 34

Blue Chip Stamps v. Manor Drug Stores,
421 U.S. 723 (1975) ..... *passim*

Brader v. Allegheny Gen. Hosp.,
64 F.3d 869 (3d Cir. 1995) 8

Cayman Exploration Corp. v. United Gas Pipe Line Co.,
873 F.2d 1357 (10th Cir. 1989) 19

Chao v. Rivendell Woods, Inc.,
415 F.3d 342 (4th Cir. 2005) 8

Conley v. Gibson,
355 U.S. 41 (1957) ..... *passim*

Cont'l Ore Co. v. Union Carbide & Carbon Corp.,
370 U.S. 690 (1962) 48

Cited Authorities

Page

Craftmatic Sec. Litig. v. Kraftsow,
890 F.2d 628 (3d Cir. 1989) 22

Crawford-El v. Britton,
523 U.S. 574 (1998) 7, 11, 25

Davis v. Monroe County Bd. of Educ.,
526 U.S. 629 (1999) 43

Davis v. Passman,
442 U.S. 228 (1979) 33, 37

DM Research, Inc. v. College of Am. Pathologists,
170 F.3d 53 (1st Cir. 1999) 19, 20, 22

Doe v. Cassel,
403 F.3d 986 (8th Cir. 2005) 8

Dura Pharms., Inc. v. Broudo,
544 U.S. 336 (2005) ..... *passim*

Educadores Puertorriquenos En Accion v. Hernandez,
367 F.3d 61 (1st Cir. 2004) 7, 21

Empress LLC v. City & County of San Francisco,
419 F.3d 1052 (9th Cir. 2005) 8

Estate Constr. Co. v. Miller & Smith Holding Co.,
14 F.3d 213 (4th Cir. 1994) 35

GE Capital Corp. v. Posey,
415 F.3d 391 (5th Cir. 2005) 8

Goldwasser v. Ameritech Corp.,
222 F.3d 390 (7th Cir. 2000) 41, 42

Cited Authorities

Page

Gomez v. Toledo,
446 U.S. 635 (1980) 7, 11, 22

Hammes v. AAMCO Transmissions, Inc.,
33 F.3d 774 (7th Cir. 1994) 9, 35

Hawaii v. Standard Oil Co.,
405 U.S. 251 (1972) 12

Heart Disease Research Found. v. General Motors Corp.,
463 F.2d 98 (2d Cir. 1972) 35

Hishon v. King & Spalding,
467 U.S. 69 (1984) 5

Hosp. Bldg Co. v. Trustees of Rex Hosp.,
425 U.S. 738 (1976) 22, 23

In re Tamoxifen Citrate Antitrust Litig.,
429 F.3d 370 (2d Cir. 2005) 38

In re Tower Air, Inc.,
416 F.3d 229 (3d Cir. 2005) 8

Jackson v. Birmingham Bd. of Educ.,
544 U.S. 167 (2005) 43

Jackson v. Iasis Healthcare Corp.,
No. 03-4050, 2004 U.S. App. LEXIS 5356
(10th Cir. March 22, 2004) 8

Law Offices of Curtis V. Trinko, LLP
v. Bell Atlantic Corp.,
305 F.3d 89 (2d Cir. 2002),
rev'd, 540 U.S. 398 (2004) 40, 41, 42, 43

Cited Authorities

Page

Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993) ..... *passim*

Lombard's Inc. v. Prince Mfg., Inc., 753 F.2d 974 (11th Cir. 1985) 35

Lupia v. Stella D'Oro Biscuit Co., 586 F.2d 1163 (7th Cir. 1978) 16

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) ..... *passim*

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 26, 38

MCM Partners, Inc. v. Andrews-Barlett & Associates, Inc., 62 F.3d 967 (7th Cir. 1995) 8

Nagler v. Admiral Corp., 248 F.2d 319 (2d Cir. 1957) 11, 47

Newport News Shipbuilding & Dry Dock Co. v. Schauffler, 303 U.S. 54 (1938) 34

NHL Players Ass'n v. Plymouth Whalers Hockey Club, 419 F.3d 462 (6th Cir. 2005) 19, 28

Papasan v. Allain, 478 U.S. 265 (1986) 32

Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1989) 7

Cited Authorities

Page

Poller v. Columbia Broad. Sys., Inc.
368 U.S. 464 (1962) 22, 23

Radovich v. National Football League,
352 U.S. 445 (1957) 12, 33

Reiter v. Sonotone Corp.,
442 U.S. 330 (1979) 12

Ruffin v. Nicely,
No. 04-5731, 2006 U.S. App. LEXIS 12392
(6th Cir. May 18, 2006) 8

Scheuer v. Rhodes,
416 U.S. 232 (1974) 30

South Austin Coal. Cmty Council v. SBC Communications, Inc.,
274 F.3d 1168 (7th Cir. 2001) 8

Sutliff, Inc. v. Donovan Cos.,
727 F.2d 648 (1984) 35

Swierkiewicz v. Sorema, N.A.,
534 U.S. 506 (2002) ..... *passim*

Tal v. Hogan,
453 F.3d 1244 (10th Cir. 2006) 35

Thomson v. Washington,
362 F.3d 969 (7th Cir. 2004) 8

United States v. Employing Plasterers Ass'n of Chicago,
347 U.S. 186 (1954) 3, 12, 33

Cited Authorities

	Page
United States v. Northern Trust Co., 372 F.3d 886 (7th Cir. 2004)	47
United States v. Topco Associates, 405 U.S. 596 (1972)	12
Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004)	4

FEDERAL RULES

Fed. R. Civ. P.:

Rule 8	*passim*
Rule 9(b)	1, 6, 7, 11
Rule 12(e)	11
Rule 16	11
Rule 26-35	11, 25
Rule 56	11

OTHER MATERIALS

Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* (Supp. 2006)	45
K. Davis and R. Pierce, *Administrative Law Treatise*, § 6.7 at 260-61 (3d ed. 1994)	6
Corinne L. Giaccobe, *Note: Allocating Discovery Costs in the Computer Age: Deciding Who Should Bear the Costs of Discovery of Electronically Stored Data*, 57 Wash. & Lee L. Rev. 257 (2000)	13

Cited Authorities

Page

Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day in court and Jury Trial Commitments?*, 78 N.Y.U. L. Rev. 982 (2003) 14, 21

T. Kauper & E. Snyder, *An Inquiry into the Efficiency of Private Antitrust Enforcement: Follow-on and Independently Initiated Cases Compared*, 74 Georgetown L. J. 1163 (1986) 13

S. Salop & L. White, *Economic Analysis of Private Antitrust Litigation*, 74 Georgetown L. J. 1001 (1986) 13

E. Snyder & T. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 Mich. L. Rev. 551 (1991) 13

William H. Wagener, *Note: Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. Rev. 1887 (2003) 13, 14

5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* (3d ed. 2004) ..... *passim*

Minutes of the Advisory Committee on Federal Rules of Civil Procedure, October 21, 1993, 1993 WL. 761148 11

SUMMARY OF THE ARGUMENT

I. Petitioners essentially ask the Court to change orthodox pleading standards, demarcated by the Court nearly a half-century ago in *Conley v. Gibson*, 355 U.S. 41 (1957) – and reaffirmed by the federal courts countless times since – by elevating the requirements, with regard to both persuasiveness and specificity, for claims asserting antitrust conspiracy. Even if one were to assume arguendo that there might be reasons for such a change, it would entail a foundational alteration to the Federal Rules of Civil Procedure. Rule 9(b) specifies those claims that must be pled with specificity, but makes no provision for any such heightened pleading requirement for antitrust or conspiracy claims. Rule 8(e)(1) mandates that in all other cases, allegations "shall be" simple and concise. This Court has squarely held several times in the last twenty-five years that the Federal Rules should be given their plain meaning, and that proposals to alter them should be considered, if at all, only in rulemaking or legislation.

II. Even if consideration of Petitioners' revolutionary proposal were appropriate in principle, there is no good reason for the proposed changes. The Advisory Committee on Federal Rules of Civil Procedure (the "Advisory Committee") has repeatedly considered adding categories of claims to Rule 9(b), and has repeatedly found such changes undesirable. Such a change would be particularly inappropriate in the antitrust context, where Congress intended private litigation to play a key role in vindicating vital public policies. Especially in the light of those policies, the Court has held squarely at least twice that heightened pleading standards in antitrust cases would not be appropriate. The policy basis on which Petitioners now urge that those holdings be revisited consists essentially of suppositions about a hypothesized, systemic problem of antitrust conspiracy "nuisance suits." Yet, heated rhetoric aside, Petitioners have made no showing whatsoever that any such widespread problem even exists in antitrust. Such a problem is implausible in light of this Court's decision in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), which already provides defendants with a uniquely

formidable weapon with which to discourage and defeat unfounded antitrust conspiracy claims. Moreover, identical professed problems of "nuisance suits" in other areas of law have been rejected in principle by the Court, as proposed bases for judicial supplementation of Rule 9(b) with new "heightened pleading requirements."

III. A. The controlling pleading standard holds that a complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim that would entitle him to relief." *Conley*, 355 U.S. at 45-46 (emphasis added). Petitioners and their amici argue that this venerable language cannot mean what it says, and that the Court effectively changed the governing standard in *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336 (2005). To support that contention, they quote language taken in *Dura* from the Court's decision, more than thirty years ago, in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). Petitioners and their amici identify no case, in the three decades since *Blue Chip Stamps*, that has ever observed the supposed alteration in pleading standards that they now attempt to tease from the language of *Blue Chip Stamps*. In fact, both *Blue Chip Stamps* and *Dura* are conceptually consistent with *Conley*.

B. The Court's opinion in *Dura* makes clear that it was *not* intended to change governing pleading standards, citing the Court's prior decision in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) for the proposition that "ordinary pleading rules are not meant to impose a great burden upon a plaintiff." *Dura*, 544 U.S. at 347. This distinguishes *Dura*, in which a securities law plaintiff would not suffer any real burden from pleading facts with regard to *his own* securities transactions (as to which discovery should not be necessary in any event), from the context presented here, in which discovery is necessary in order for a plaintiff to obtain full command of facts germane to antitrust conspiracy. For this very reason, the Court has specifically recognized that dismissal prior to giving the plaintiff "ample opportunity" for discovery in antitrust conspiracy cases is especially inappropriate.

C. Aware that "heightened pleading standards" of the type they advocate have been held by the Court to be impermissible, Petitioners and their amici attempt to call what they are asking for a "context specific inquiry," and argue that the degree of necessary particularity "depends on applicable substantive law." This argument, however, is a mere retread of an identical argument made, and sensibly rejected, in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 167 (1993)(any "more demanding rule for pleading [one kind of claim] than for other kinds of claim" is a prohibited "heightened pleading standard").

D. Petitioners' own proposal – to apply summary judgment standards of *Matsushita* at the Rule 12(b)(6) stage – is precisely analogous to proposals made to the Court, and decisively rejected, in *Swierkiewicz*. The Solicitor General in his brief disavows any support for this proposal made by Petitioners, which is also undesirable for multiple practical reasons.

E. Instead, the Solicitor General makes his own proposal. His proposal is unclear as to whether it would include a higher persuasiveness requirement than *Conley*, because the Solicitor General includes two significantly different formulations of his proposed standard in his brief. To the extent that the Solicitor General's proposal would conflict with *Conley* by elevating persuasiveness requirements, it is unsupported by policy or precedent. The Solicitor General's arguments also would permit simple and concise allegations of fact to be ignored on the basis that they are "conclusory." In that regard his arguments are contrary not only to Rule 8(e)(1), but to *United States v. Employing Plasterers Ass'n of Chicago*, 347 U.S. 186, 188-89 (1954) ("*Employing Plasterers*"), which rejected a proposed distinction between "allegations of fact" and "mere conclusions of the pleader," and "laid to rest any lingering doubt as to the propriety of 'conclusions' in a pleading." 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* ("Wright & Miller"), § 1218 at 267 (3d ed. 2004).

F. Certain of Petitioners' amici mischaracterize the Second Circuit's decision below as though it held that "parallel conduct is enough" to state a claim of conspiracy. But in fact, the Second Circuit sensibly reasoned that a court should look to "the particular parallelism asserted," to ascertain whether it is "plausible" to allege the pertinent conspiracy. In other words, the Second Circuit merely recognized that not *all* conduct that might be called "parallel" has the same significance, and that in principle – depending on the "particular parallelism" in question – conduct that might be called parallel "can suffice," in an appropriate case, to satisfy controlling pleading standards.

G. Certain of Petitioners' other amici argue for a "plus factors pleading requirement," but at least some of their amici correctly recognize that such a rigid, formal pleading rule would be inappropriate on a motion to dismiss – a conclusion mandated by the Court's analysis in *Swierkiewicz*, 534 U.S. at 512 (a flexible evidentiary standard designed for summary judgment "should not be transposed into a rigid pleading standard").

IV. Once questions of governing pleadings standards have been clarified, it is clear that the allegations made here not only satisfy *Conley's* pleading standard, but would satisfy any pleading standard that might apply, because Respondents have made multiple simple and concise allegations of "plus factors" suggestive of an entirely plausible conspiracy. Petitioners attempt to cloud that question by insinuating that this case was brought merely to circumvent the Court's decision in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), but a true chronology of events shows this suggestion to be baseless. When correct rules of pleading are applied to the complaint, it is clear that the complaint states a claim. The Second Circuit's decision should therefore be affirmed.

ARGUMENT

I. Petitioners' Proposal To Reduce Discovery Burdens By Erecting Heightened Persuasiveness And Specificity Requirements For Antitrust Conspiracy Claims Would Be Inappropriately Considered On A Petition For Certiorari, And Should Be Considered, If At All, Only In Rulemaking Or Legislation.

The arguments of Petitioners and their amici rest principally on supposed concerns of public policy (*but see* Part II below), rather than on existing precedent under the Federal Rules of Civil Procedure. Indeed, even the Solicitor General's brief, while declining to support the radical proposal by Petitioners to transpose *Matsushita's* summary judgment standard to the motion to dismiss stage (Brief for the United States as Amicus Curiae Supporting Petitioners ("SG Br."), 22-23), nonetheless contends that the venerable "any set of facts" pleading standard of *Conley* should be jettisoned in antitrust conspiracy cases for ostensible reasons of public policy (*id.* at 18, 24). However, this Court has repeatedly reaffirmed the controlling "any set of facts" legal standard since the 1957 decision in *Conley*.[1] Whether such bedrock pleading rules might better be restructured from the standpoint of public policy is a question far better addressed in the context of rulemaking proceedings than in case-by-case adjudication. Even if, as Petitioners' amici tellingly find it necessary to argue, it were true that "modern complex litigation does not fit neatly into the paradigm of litigation envisioned by the drafters of the federal rules in 1938" (Brief of *Amici Curiae* Legal Scholars in Support of Petitioners ("Legal Scholars Br."), 15 n.7), the appropriate response would be to update the rules themselves through a rulemaking process, and not to open the door to *ad hoc* deviations from existing Federal Rules in individual cases.

---

1. *E.g., Swierkiewicz*, 534 U.S. at 514 ("A court may dismiss a complaint only if it is clear that no relief could be granted *under any set of facts* that could be proved consistent with the allegations")(emphasis added; quoting from *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)).

"Over the years, commentators, judges, and Justices have shown near unanimity in extolling the virtues of the rulemaking process over the process of making 'rules' through case-by-case adjudication." K. Davis and R. Pierce, *Administrative Law Treatise*, § 6.7 at 260-61 (3d ed. 1994). Rulemaking produces higher quality rules because in the context of case-by-case adjudication, there is no way "of knowing whether the fact pattern before it applies to 100 percent, 50 percent, 10 percent, or 1 percent of superficially analogous relationships or incidents." *Id.* at 261. In the rulemaking context, unlike that of a specific case, "parties have incentives to include in their comments studies and affidavits of experts addressing such issues as (1) the frequency of occurrence of various factual patterns, (2) the likely efficacy of alternative rules in shaping conduct, (3) the cost of compliance with alternative rules, and (4) the practical problems inherent in implementing or enforcing alternative rules in varying factual contexts." *Id.* at 262. Such critical information is often absent – just as it is here (see Part II below) – in the context of case-by-case adjudication. Rulemaking also has other advantages over case-by-case adjudication that are salient here, including: (i) enhanced political accountability, and (ii) greater rulemaking clarity. *Id.* at 262-66.

Recognizing such considerations, the Court in recent years has repeatedly rejected arguments – precisely analogous to those made by Petitioners and their amici here – that heightened pleading burdens other than those contained in Rule 9(b) should be erected judicially, in order to relieve discovery burdens in particular categories of cases. In *Leatherman*, petitioners urged that pleading standards should be heightened in civil rights cases against municipalities, arguing that to apply ordinary pleading standards to such claims "would subject municipalities to expensive and time-consuming discovery in every §1983 case." 507 U.S. at 166. The Court rejected such policy arguments as a matter of principle, stating that absent amendments to the Federal Rules of Civil Procedure, "federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later." *Id.* at 168-69.

The Court in *Leatherman* squarely held that a requirement for greater specificity for particular claims is a result that "must be obtained by the process of amending the Federal Rules, *and not by judicial interpretation*." *Id.* at 168 (emphasis added).

In *Swierkiewicz*, the Court reiterated this clear holding of *Leatherman*, refusing even to consider an argument ("whatever" its "practical merits") that application of orthodox pleading standards would "burden the courts and encourage disgruntled employees to bring unsubstantiated suits." 534 U.S. at 514-15. Instead, the Court stated in *Swierkiewicz* that the Federal Rules rely "on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Id.* at 512. *See also, Crawford-El v. Britton*, 523 U.S. 574, 595 (1998) (It would be inappropriate to adopt a heightened proof standard "to reduce the availability of discovery in actions that require proof of motive" because such "[q]uestions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process"); *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 123 (1989)("We give the Federal Rules of Civil Procedure their plain meaning, and generally with them, as with a statute, '[w]hen we find the terms . . . unambiguous, judicial inquiry is complete. . . .'"); *Gomez v. Toledo*, 446 U.S. 635, 639-40 (1980) (refusing to change the Federal Rules governing pleading by requiring the plaintiff to anticipate and plead in advance to rebut an immunity defense).

Especially after *Swierkiewicz*, every Court of Appeals has now recognized that the *only* heightened pleading requirements that are to be applied, absent amendments to the Federal Rules, are those explicitly provided for either in the text of Rule 9(b) or in legislation, such as that contained in the Private Securities Litigation Reform Act (the "PSLRA"), which is specifically directed toward such questions.[2] That

2. *See Educad[illegible] Puertorriquenos En Accion v. Hernandez*, 367 F.3d 61, 66 (1st Cir. 2004) ("overruling" prior decisions erecting heightened pleading (Cont'd)

conclusion follows inexorably from the rationale, unambiguously embraced by the Court in *Leatherman*, that in Rule 9(b), "*[e]xpressio unius est exclusio alterius.*" 507 U.S. at 168. Although some Circuits (including the Second Circuit) were slower to absorb that message from *Leatherman*, others such as the Third and Seventh Circuits had no difficulty reaching that same conclusion specifically with regard to antitrust conspiracy claims long before *Swierkiewicz*, based solely on *Leatherman*.[3] *See*, 5 Wright & Miller, § 1221 at 292-93

(Cont'd)

standards and doing so "globally," while observing that *Swierkiewicz* "has sounded the death knoll for the imposition of a heightened pleading standard except in cases in which either a federal statute or specific civil rule requires that result," and that in *Swierkiewicz* "the Court has signaled its disapproval of all heightened pleading standards except those that emanate from either congressional or Rule-based authority"); *In re Tower Air, Inc.*, 416 F.3d 229, 237-38 (3d Cir. 2005) ("a plaintiff will not be thrown out of court on a Rule 12(b)(6) motion for lack of detailed facts" and "[t]o hold otherwise would be effectively to transform Rule 12(b)(6) motions into multi-purpose summary judgment vehicles. That we will not do."); *Chao v. Rivendell Woods, Inc.*, 415 F.3d 342, 347 (4th Cir. 2005)("unmeritorious claims . . . are eliminated not by motions to dismiss, but rather primarily through 'liberal discovery rules and summary judgment motions'"); *GE Capital Corp. v. Posey*, 415 F.3d 391, 396-97 (5th Cir. 2005) ("[o]ther than in the situations expressly enumerated in rule 9(b), e.g. allegations of actual fraud, plaintiffs must satisfy only the minimal requirements of rule 8(a)."); *Ruffin v. Nicely*, No. 04-5731, 2006 U.S. App. LEXIS 12392, at *18-21 (6th Cir. May 18, 2006); *Thomson v. Washington*, 362 F.3d 969, 970-71 (7th Cir. 2004); *Doe v. Cassel*, 403 F.3d 986, 989 (8th Cir. 2005); *Empress LLC v. City & County of San Francisco*, 419 F.3d 1052, 1056 (9th Cir. 2005); *Jackson v. Iasis Healthcare Corp.*, No. 03-4050, 2004 U.S. App. LEXIS 5356, at **6 (10th Cir. March 22, 2004); *Andrx v. Pharm., Inc. v. Elan Corp.*, 421 F.3d 1227, 1234-35 (11th Cir. 2005).

3. *E.g., Brader v. Allegheny Gen. Hosp.*, 64 F.3d 869, 876 (3d Cir. 1995) ("[w]e believe that such impatience with the notice pleading embodied in the Federal Rules is foreclosed by the Supreme Court's decision in *Leatherman*. . . ."); *South Austin Coalition Cmty. Council v. SBC Communications, Inc.*, 274 F.3d 1168, 1171 (7th Cir. 2001) (rejecting as "not correct", under *Leatherman*, the proposition "that antitrust complaints must be more thorough than the normal civil complaint, the better to curtail the high cost of antitrust litigation by facilitating early disposition"); *MCM Partners, Inc. v. Andrews-Barlett & Assocs.*, 62 F.3d 967, 976 (7th Cir. 1995)

(Cont'd)

(*Swierkiewicz* was necessary because "[s]ome federal courts . . . did not generalize the principle set forth in *Leatherman*"). This Court should not now reverse direction, and lead the Courts of Appeals back toward the adoption of divergent and unpredictable pleading requirements, on an uninformed, *ad hoc* basis, based on idiosyncratic and intuitive judgments concerning comparative burdens or likely merits of entire categories of civil claims. Yet, that is precisely what Petitioners would have the Court do.

Arguments offered here by Petitioners and their amici further support deference toward rulemaking or legislation, in at least two ways. *First*, some of the arguments made by Petitioners' amici involve such far-reaching questions of policy that they would implicate very serious substantive issues, and not only pleading standards. For example, the American Petroleum Institute ("API") argues that the reason antitrust pleading standards should be changed is that "most antitrust conspiracies are uncovered by the federal antitrust enforcement agencies, and that most successful private antitrust actions alleging unlawful conspiracies simply follow on from violations initially discovered and prosecuted by the government." Brief of the American Petroleum Institute as Amicus Curiae Supporting Petitioners ("API Br."), 11-12. In this argument, API echoes one side of a debate that is actively raging in connection with the Antitrust Modernization Commission ("AMC"), concerning the appropriate relationship between public and private antitrust enforcement. (*See* www.amc.gov.) Because the question presented here involves much narrower questions of mere pleading standards, the other side of that debate has not weighed in

(Cont'd)

(Judicial attempts to apply a heightened pleading standard in antitrust cases had been "scotched" by the Supreme Court's decision in *Leatherman*, and "after *Leatherman*, an antitrust plaintiff need not include the particulars of his claim to survive a motion to dismiss."). Indeed, on the basis that Rule 8(a) applies, the Seventh Circuit has affirmatively chided plaintiffs' lawyers for doing more after *Leatherman*, writing in an antitrust case that "[w]e continue to be puzzled why lawyers insist on writing prolix complaints that can only get them into trouble." *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 778 (7th Cir. 1994) (Posner, J.).

here, and important voices on that subject, including those of antitrust enforcement agencies, have not been fully heard. API's apparent view on the subject would likely be unsupported by many, as exemplified by recognition in the Solicitor General's brief that the antitrust laws clearly provide for enforcement by private parties and that "[m]eritorious private antitrust suits provide an important check against harmful anticompetitive conduct." SG Br. 1.[4] Rulemaking or legislation would be a strongly preferable context in which to consider arguments such as those made here, in order that a full range of constructive views is considered and to enhance political accountability.

Second, the content of briefs currently before the Court dramatizes the disadvantages of litigation from the standpoint of clarity in rulemaking. As shown in Part III below, Petitioners argue for one new pleading standard, their amici argue for various different ones, and the Solicitor General argues simultaneously for two materially different standards, while not acknowledging important differences in language between the two different proposals that he advances. Petitioners and their amici largely pass like ships in the night, scarcely acknowledging that the standards that they propose have differences, much less contributing to any thorough collective dialogue about relative merits and defects of the different standards being suggested. Especially given that one change in the Federal Rules may necessitate corresponding changes in others, the narrow and contentious dialogue that accompanies a contested case is not the most conducive context in which to consider potentially far-reading changes to the

4. Unlike nearly all other amicus briefs filed by the Solicitor General in recent antitrust cases in this Court, the Solicitor General's brief in this case is not joined in by any representative of the Federal Trade Commission ("FTC"). This is not for lack of interest, as FTC representatives vigorously participated in meetings with counsel on both sides before the Solicitor General's brief was filed. To be sure, the Solicitor General has full authority to take such positions as he finds appropriate on behalf of the Executive branch, with or without concurrence from an independent regulatory agency like the FTC. Nonetheless, the apparent lack of concurrence of the FTC in the positions taken by the Solicitor General should not escape the Court's notice.

Federal Rules. This Court has judiciously declined, in *Gomez*, *Leatherman*, *Crawford-El* and *Swierkiewicz*, to start down such a path in individual cases. It should decline to do so again.

II. Even If Properly Considered Here, Petitioners' Proposal Is Ill-Advised, And Has Not Been Supported By Even A Minimal Showing That "Nuisance Suits" For Antitrust Conspiracy Are Common.

Notably, the same year when *Leatherman* was decided the Advisory Committee found that it would be "undesirable" to require additional types of cases, including antitrust cases, to be pleaded with particularly under Rule 9(b):

> The possibility of increasing the Rule 9 categories of claims that must be pleaded with particularly seemed undesirable to virtually all committee members who spoke to the question. There is a real risk that imposing specific pleading requirements for specific legal theories will be seen as a substantive decision that these theories are disfavored. . . .

Minutes of the Advisory Committee on Federal Rules of Civil Procedure, October 21, 1993, 1993 WL 761148, at *6. In making this policy judgment, the Advisory Committee was merely reaffirming views of the original framers of the Federal Rules, as made clear in *Nagler v. Admiral Corp.*, 248 F. 2d 319, 323 (2d Cir. 1957):

> When the rules were adopted there was considerable pressure for separate provisions in patent, copyright, and other allegedly special types of litigation. Such arguments did not prevail; instead there was adopted **a uniform system for all cases – one which nevertheless allows some discretion to the trial judge to require fuller disclosure in a particular case by more definite statement, F.R. 12(e), discovery and summary judgment, F.R. 26-35, 56, and pre-trial conference, F.R. 16.**

This broad policy judgment of the Advisory Committee is especially deserving of deference in antitrust cases, in view of the vital importance of antitrust law,[5] and of private litigation to its adequate enforcement.[6] Accordingly, this Court has specifically held more than once that heightened pleading requirements would be inappropriate in antitrust cases. *Radovich v. National Football League*, 352 U.S. 445, 454 (1957) ("In the face of such a policy, this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those [antitrust] laws."); *Employing Plasterers*, 347 U.S. at 189 (in antitrust cases "where a bona fide complaint is filed that charges every element necessary to recover, summary dismissal of a civil case for failure to set out evidential facts can seldom be justified."). The Second Circuit's opinion echoes these rulings, observing that heightened pleading requirements would be especially inappropriate "in a regime that contemplates the enforcement of antitrust laws in large measure by private litigants. . . ." Pet. App. 29a.

Even if the Advisory Committee's judgment were accorded no deference, and even if reconsideration of this Court's longstanding precedents on point might be entertained in principle, Petitioners have not shown reasons for any change. In our briefing below, we repeatedly challenged Petitioners to identify any respectable study or judicial authority that could support an assertion that antitrust cases tend to settle for small 'harassment value' sums, as Petitioners and their amici continue groundlessly to suggest as a primary

5. "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972).

6. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) (private actions "provide a significant supplement to the limited resources available to [DOJ] for enforcing the antitrust laws and deterring violations"); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972) (In the antitrust laws "Congress encouraged [private litigants] to serve as 'private attorneys general.').

basis for their arguments.[7] No doubt having "boiled the ocean" in an attempt to find such studies, Petitioners and their amici have cited none, because none exists.[8] As explained in Part I

7. SG Br. 25 (hypothesizing a problem of antitrust conspiracy "strike suits"); API Br. 3 ("defendants have an incentive to settle even meritless antitrust claims in order to avoid huge discovery costs.").

8. Certain amici do cite studies that they claim show "plaintiffs' lawyers use litigation to extract money from businesses that find it is cheaper and less risky to settle than to litigate." Brief of *Amici Curiae* Economists in Support of Petitioners ("Economist Br."), 12 & n.10. However, none of those studies supports suggestions that settlements reached in antitrust conspiracy cases are either: (i) frequently reached early in order to avoid attorneys' fees; or (ii) settled for less than the defendants' likely attorney fees. For example, the first article they cite is a study limited to cases brought by competitors, and deals principally with questions of standing and antitrust injury, which would be entirely beside the point with regard to horizontal conspiracy cases like this one brought by consumers. F. Snyder & T. Kauper, *Misuse of the Antitrust Laws. The Competitor Plaintiff*, 90 Mich. L. Rev. 551 (1991). To the extent that any findings in the second study are relevant at all they undermine any notion that "nuisance suits" are a systemic problem in antitrust cases, by finding that the overall rates at which antitrust cases are either dismissed by the courts or litigated to some other conclusion is "higher than for other civil cases." T. Kauper & E. Snyder, *An Inquiry into the Efficiency of Private Antitrust Enforcement: Follow-on and Independently Initiated Cases Compared*, 74 Georgetown L. J. 1163, 1189 & n.69 (1986). The third article explicitly acknowledges that its findings are just as suggestive "that antitrust is a well-functioning system economizing on costly litigation to the parties' mutual benefit" as of anything else. S. Salop & L. White, *Economic Analysis of Private Antitrust Litigation*, 74 Georgetown L. J. 1001, 1030 (1986). API cites extensively to two law student notes (not cited as such). API Br. 7-10. *See* William H. Wagener, *Note: Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. Rev. 1887 (2003); Corinne L. Giaccobe, *Note: Allocating Discovery Costs in the Computer Age: Deciding Who Should Bear the Costs of Discovery of Electronically Stored Data*, 57 Wash. & Lee L. Rev. 257 (2000). The first note advertises its lack of objectivity by stating that it "presumes the existence of litigants willing to bring 'frivolous' antitrust claims," 78 N.Y.U. L. Rev. 1900, and does not even attempt to analyze actual outcomes of any antitrust cases. The statement in the second that API quotes (API Br. 10) is not even made in connection with antitrust claims. Obviously, neither student author has personal experience with antitrust cases on which to base the observations for which they are cited. Notably, however, the first note does acknowledge

(Cont'd)

above, there are compelling reasons to require that any such initiative be evaluated in the rulemaking context, which lends itself much more readily to thoughtful study of such issues, rather than succumbing in a particular case to unsubstantiated "tort reform" rhetoric that has no connection to the actual workings of antitrust conspiracy cases. *Cf.*, Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day in court and Jury Trial Commitments?*, 78 N.Y.U. L.Rev. 982, 1133 (June 2003) ("Unfortunately, today's rhetoric about the 'litigation explosion' [and] a 'liability crisis' . . . may be encouraging district courts and courts of appeals to rely on [*Matsushita*] to justify resorting to pretrial disposition too readily. . . .").

Just as they did in the courts below, Petitioners and their amici continue to rely primarily on authorities that have dealt with special problems attending the entirely different legal field of *securities* fraud, rather than antitrust. However, this Court has recognized, in *Blue Chip Stamps*, that securities litigation "presents a danger of vexatiousness *different in degree and kind* from that which accompanies litigation in general." 421 U.S. at 739 (emphasis added).[9] As the Second Circuit pointed out below (Pet. App. 30a & n.13), Congress took extensive action to address such unique concerns in the securities law context in 1996 and 1998, by enacting the PSLRA and the Securities Litigation Uniform Standards Act ("SLUSA"), respectively. Proposals for still further reform in the securities field also continue to percolate, based in large measure on *actual data* that their proponents claim shows

---

(Cont'd)
that to implement changes in antitrust pleading standards "without congressional action or amendments to the Federal Rules of Civil Procedure appears to be foreclosed." 78 N.Y.U.L. Rev. at 1919.

9. The ABA brief quotes portions of later text from *Blue Chip Stamps*, but with an ellipsis omitting the words "in this type of case," which tends to obscure the fact that the Court there, as in the earlier quote above, was carefully *distinguishing* securities cases from all other litigation. Brief of the American Bar Ass'n as *Amicus Curiae* in Support of Neither Petitioners Nor Respondents ("ABA Br."), 12.

unique problems relating to coerced, cheap settlements in securities cases.[10]

Although thorough consideration has been given in recent years to the potential for improvements in antitrust, such consideration has yielded *nothing* that supports Petitioners' core policy hypothesis that "nuisance suits" are a systemic problem in antitrust conspiracy cases. In 2002, Congress created the AMC. (*See* www.amc.gov.) Since June 2005, the AMC has been actively engaged in an exhaustive process of analyzing and identifying potential problems in current antitrust law that might warrant legislative correction. A great deal of testimony has been given before the AMC, by some of the most distinguished antitrust practitioners and experts in the country. Even though much of that testimony relates to broad aspects of private antitrust litigation – including but not limited to a day of testimony on July 28, 2005 devoted entirely to questions of civil remedies – the testimony will be searched in vain for anything supporting Petitioners' bare assertions here, that inexpensive, early settlements for less than a defendant's likely attorneys' fees are a widespread problem in antitrust conspiracy cases.

Indeed, any such systemic problem in the antitrust conspiracy context would be implausible in light of *Matsushita*. It already provides defendants with a uniquely formidable weapon with which to crush unfounded antitrust conspiracy cases on summary judgment – significantly, a weapon for which *no counterpart exists* in the securities fraud cases to which

10. Types of data that proponents of further legislation have highlighted recently include, for example, data indicating that 70% of securities cases settled in 2004 were settled for less than $10 million, providing at least some support for the notion that many securities cases are settled for less than the attorneys' fees that it would have cost to defend them. NERA Economic Consulting, "Recent Trends in Shareholder Class Action Litigation: Bear Market Cases Bring Big Settlements" (2005). Such studies are illustrative of the types of studies that we have challenged Petitioners to identify, but that they have proven completely unable to identify, relating to private *antitrust* cases.

Petitioners seek to force an analogy.[11] Given that potential damages at stake in nationwide antitrust conspiracy cases are usually well over a hundred million dollars – and thus are far more than any likely attorneys' fees – the rational course of action for antitrust defendants generally is to defend weak claims vigorously, and to attempt to defeat them on summary judgment, rather than to succumb to cheap, early settlements of the type hypothesized by Petitioners. Those antitrust cases that settle early instead are not unfounded cases, but rather cases in which felony pleas or other merits-related developments show early on that the defendants have little hope of ultimately prevailing on summary judgment under *Matsushita*. By definition, such cases are not groundless "nuisance suits."[12]

A criticism much more often made of private antitrust cases is that they tend to be brought as "follow-on" cases to government enforcement proceedings. One of Petitioners' amici raises this criticism. API Br. 11-12. But far from showing any systemic danger of inexpensive settlements for less than probable attorneys' fees in antitrust cases, what this tends to show instead is that antitrust plaintiffs are often fearful of bringing cases, when there is no prior government action that will help to survive a summary judgment motion under *Matsushita*. This is just the opposite of the situation fancifully posited by Petitioners, in which "strike suits" supposedly are brought by antitrust plaintiffs willy-nilly in the hope of achieving a cheap, early settlement in order to avoid legal fees.

11. API quotes from *Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163, 1167 (7th Cir. 1978), but all it supports, viewed in context, is greater availability of summary judgment – *i.e.*, what the Court provided eight years later in *Matsushita*.

12. To the extent that an imprudent or inexperienced plaintiffs' attorney might elect to pursue an expensive, groundless antitrust conspiracy claim on a contingent fee basis, the costs of such a claim, coupled with the inevitable ultimate dismissal of the claim on summary judgment under *Matsushita*, either discourage such a plaintiffs' attorney from ever repeating such an error, or assure that such an imprudent attorney will lose money in the process and will soon find it necessary to move on to another professional field.

Similarly, another of Petitioners' amici cites statistical data emphasizing that antitrust cases last longer than other litigation. Brief of Mastercard and Visa as *Amici Curiae* In Support of Petitioners ("MC Br."), 21 n.7. Once again, to the extent that antitrust litigation lasts longer, that *undermines* the unfounded notion that antitrust is a legal field in which meritless "strike suits" are settled early and cheaply to avoid legal fees. Thus, to the extent that Petitioners' amici even purport to make observations about how private antitrust litigation *actually functions*, the few concrete observations that they make merely undermine their unsubstantiated rhetoric concerning a supposed systemic problem of antitrust conspiracy "strike suits."

III. The Diverse Legal Standards Proposed By Petitioners And Their Amici Conflict With Bedrock Pleading Standards Under Rule 12 (B)(6).

A. A Rule 12 (b)(6) motion must be denied if it appears that "any set of facts" would justify recovery.

Nearly a half-century ago, in *Conley*, this Court made clear that it would follow "*of course, the accepted rule* that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff *can prove no set of facts* in support of his claim that would entitle him to relief." 355 U.S. at 45-46 (emphasis added). At least since that time, this "no set of facts" formulation has been a cornerstone of federal procedure, and has been reaffirmed innumerable times by the federal courts. *See* 5 Wright & Miller, § 1215 at 203-04 (*Conley's* "any set of facts" rule is supported by such a "wealth of judicial authority" that "complete citation to the case law is neither feasible nor useful."). Petitioners and their amici nonetheless essentially seek to overturn this long-established precedent. Brief for Petitioners ("Pet. Br.") 2, 27; SG Br. 18, 24; ABA Br. 2-3; Legal Scholars Br. 10-11.

In this Court's decisions, the primary case upon which Petitioners and their amici rely for their attack on *Conley's* "no set of facts" standard is *Dura*. However, the actual language of *Dura* to which they turn is merely a quote from the Court's

opinion more than thirty years ago, in *Blue Chip Stamps*, in which the Court merely identified as one goal of the pleading rules to require "a *reasonably founded hope* that the [discovery] process will reveal relevant evidence." 544 U.S. at 347 (emphasis added). The Solicitor General repeatedly adds his own phrase "sufficient to establish the plaintiff's claim," as though something of equivalent meaning followed the words "will reveal relevant evidence" in *Blue Chip Stamps* and in *Dura*. SG Br. 10, 11. However, no such words in fact appear in either *Blue Chips Stamps* or *Dura*, in which the Court plainly was not attempting to state a broad pleading standard at odds with *Conley*.

Despite this forced effort to transform language from *Blue Chip Stamps* and *Dura* into something inconsistent with *Conley*, there is no inconsistency. If it "appears beyond doubt that the plaintiff can prove no set of facts" that would support relief, that is because there is no "reasonably founded hope" that discovery will illuminate the claims. Conversely, if there is no "reasonably founded hope" of relevant discovery, that is because it appears beyond doubt "that the plaintiff can prove no set of facts" relevant to the claim. From a conceptual standpoint, both standards require only a reasonable *possibility* – and not a predominance of likelihoods, or a certainty – that the plaintiff's claim might be supported by evidence *yet to be obtained* through discovery. *See also, Swierkiewicz*, 534 U.S. at 511-12 (finding it inappropriate to require pleading of matters that will not be necessary to prove even at trial "if direct evidence of discrimination is uncovered" in discovery); Rule 11 (b)(3) (allegations made on information and belief need only be "likely to have evidentiary support *after a reasonable opportunity for further investigation or discovery*") (emphasis added).

Even apart from the logical symmetry of these legal standards, if any inconsistency between them had been intended, and if the *Blue Chip Stamps* language had been intended to change the rule of *Conley*, the courts surely would have discerned that long ago, since it has been more than three decades since the pertinent phraseology was formulated in

Blue Chip Stamps. Petitioners and their amici cannot identify even a single case in the intervening thirty years that has made note of the invisible inconsistency that they now profess to find between these governing legal standards. Any notion that such inconsistency exists also would be flatly contradicted by the fact that the "any set of facts" formulation of *Conley* has been reaffirmed repeatedly in the interim, not only by this Court but in countless other federal cases.

In decisions of the Circuit Courts, virtually the only precedent that Petitioners now continue to rely heavily upon is *DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53 (1st Cir. 1999).[13] But there is no genuine inconsistency between *DM Research* and the "no set of facts" standard of *Conley*. In *DM Research*, the complaint alleged that a standard-setting organization ("National") and a non-profit college of pathologists ("the College") had conspired with one another to adopt "faulty and arbitrary standards and guidelines" for a type of water used by pathologists in medical tests. However, the First Circuit found that there was *no plausible motive* for National and the College to enter into such a conspiracy, writing that "it is highly implausible to suppose that the College or its members have any reason to 'agree' with National to adopt a faulty standard whose main effect would be to raise costs for laboratories. . . ." 170 F.3d at 56. The court took pains to point out that such an explanation of a plausible motive was *not* required to be given in the complaint, but could have been provided instead in the plaintiffs' brief or by affidavit, but that the plaintiff had proven completely unable to explain what possibly could have motivated the allegedly conspiring parties to enter into such an utterly implausible conspiracy. *Id.*

13. In their petition Petitioners also professed to rely heavily on *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357 (10th Cir. 1989) and *NHL Players Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462 (6th Cir. 2005). After Respondents showed in their Brief in Opposition ("Opp. Cert.") that such reliance was misplaced (Opp. Cert. 10-11), Petitioners and their amici have dropped nearly all reference to both cases. That leaves *DM Research* as the *only* Circuit Court decision that Petitioners continue to argue directly supports their proposed legal standard for antitrust conspiracy cases on a Rule 12(b)(6) motion.

In such circumstances, to apply the phraseology of *Conley*, it would seem beyond doubt that the plaintiff could have proven "no set of facts in support of his claim that would entitle him to relief." Alternatively, to apply the language from *Blue Chip Stamps*, such circumstances would support no "reasonably founded hope that the [discovery] process will reveal" relevant evidence. The First Circuit did not use those particular phrases, stating instead that the claim would be dismissed because it was "highly implausible" and consisted of "nothing more than unlikely speculations." 170 F.3d at 56. However, nothing in those phrases is conceptually at odds with the effectively equivalent standards expressed by this Court in *Conley* and *Blue Chip Stamps*. Instead, the "plausibility" standard of *DM Research*, just like the standards in *Conley* and *Blue Chip Stamps*, again requires only a reasonable *possibility* — and not a predominance of likelihoods, or a certainty — that the plaintiff's claim might be supported by evidence *yet to be obtained* through discovery.

Indeed, it is ironic that Petitioners and their amici rely so heavily on *DM Research* in attacking the standard expressed by the Second Circuit below. The Second Circuit painstakingly incorporated the "implausibility" and "unlikely speculations" language from *DM Research* into its own articulation of the governing legal standard below. Pet. App. 20a, 22a n.6. The Second Circuit rightly perceived no inconsistency between this language and this Court's "any set of facts" phraseology in *Conley*, also explicitly citing and quoting *Conley's* controlling language. Pet. App. 11a, 25a. By contrast, Petitioners and their amici seek to distort *DM Research* by ignoring the facts of extreme implausibility with which the court in *DM Research* was actually confronted, and attempting to fashion an entirely new legal standard out of *dicta* that played no real role in the *DM Research* decision.

Furthermore, even if passing *dicta* in *DM Research* might be claimed to suggest a heightened pleading standard for antitrust conspiracy cases, such *dicta* would be contrary to *Swierkiewicz*, which was not decided until after the *DM Research* opinion. Subsequent to both *DM Research* and *Swierkiewicz*,

the First Circuit itself has relied on *Swierkiewicz*, in explicitly abrogating heightened pleading standards that did exist under its prior case law. *Educadores*, 367 F.3d at 66. Thus, the First Circuit was merely one of those Circuits that were slower fully to absorb the meaning of *Leatherman*. *See* p. 8, *supra*. Strained efforts by Petitioners and their amici to find support for their arguments in outdated dicta from *DM Research* are therefore misplaced.

Even if one could brush all existing precedent entirely aside, the Second Circuit's requirement of a "plausible" conspiracy, with alleged conspiracies that amount only to "unlikely speculations" being dismissed, makes eminent sense. Without the benefit of discovery, it will always be difficult to know in advance with a high degree of assurance, based solely on observations of public conduct and market circumstances, whether a conspiracy occurred. Instead, in circumstances genuinely suggestive of conspiracy, such considerations will show only some reasonable degree of likelihood of conspiracy. Suppose – hypothetically and using an example involving false precision – that on the alleged facts of a particular case, all objective observers could agree that the likelihood that a conspiracy occurred is 35 to 40 per cent. Clearly, further discovery into whether conspiracy actually exists in such circumstances – which is all that the denial of a Rule 12(b)(6) motion commences – would be appropriate. Since the current statutory structure unquestionably intends private antitrust cases to play a vital enforcement role, to conclude otherwise would run afoul of the Court's recognition, in *Matsushita* itself, that dangers of mistaken liability inferences "must be balanced against the desire that illegal conspiracies be identified and punished." 475 U.S. at 594. To require, instead, a preponderance of likelihoods (*i.e.*, a probability figure greater than 50%) or even more, based on such considerations as the "inexpensive determination" language of Rule 1, would be to let Rule 1's "inexpensiveness" language trump its primary mandate, that the rules be construed in such a way as to secure the "just" resolution of cases.

A more difficult question is what words best express the threshold of implausibility beyond which a line should be drawn, and beyond which sufficiently improbable allegations of conspiracy should be dismissed. Borrowing the phrase from *DM Research*, the Second Circuit expressed that threshold as one of "unlikely speculations." Although perhaps that language could be improved upon, we submit that that choice of language, which the Second Circuit's opinion carefully anchors in existing precedent, draws the line in a reasonable place. To the extent the place where the Second Circuit drew that line is reasonable and accords conceptually with the controlling "any set of facts" standard of *Conley*, as shown above, the Second Circuit's decision below should be affirmed.

B. Pleading standards are especially relaxed as to matters, like conspiracy, that are "peculiarly within the opposing party's knowledge."

It has long been held generally that pleading requirements must be *more* relaxed – not less – with regard to matters peculiarly within the opposing party's knowledge. *E.g., In re Craftmatic Sec. Litig.*, 890 F.2d 628, 645 (3d Cir. 1989). In a specific application of this principle, this Court squarely held, in *Hosp. Bldg. Co. v. Trs. Of Rex Hosp.*, 425 U.S. 738, 746 (1976), that "in antitrust cases, *where the 'the proof is largely in the hands of the alleged conspirators,'* . . . dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." (emphasis added). *See also, Poller v. Columbia Broad. Sys.*, 368 U.S. 464, 473 (1962) (summary disposition is uniquely problematic "in complex antitrust litigation where motive and intent play leading roles, *the proof is largely in the hands of the alleged conspirators*, and hostile witnesses thicken the plot.")(emphasis added); *cf. Gomez*, 446 U.S. at 640-641 (placing substantial weight on matters being "peculiarly within the knowledge of the defendant" when allocating pleading burdens). Indeed, ABA acknowledges in its brief that policies *against* requiring a plaintiff "to provide a detailed factual underpinning for their claims" have "particular salience when the best evidence of the validity of the claim

likely lies in the hands of the defendants, as is often the case with antitrust conspiracy allegations." ABA Br. 8.

This important principle highlights the inappropriateness of the heavy reliance that Petitioners and their amici place on *Dura*. In *Dura*, the issue was whether a securities plaintiff could fairly be required to plead basic matters relating to *his own transactions*, sufficient merely to "provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind." 644 U.S. at 347. Because facts relating to a plaintiffs' own securities transactions and injuries would be fully available to the plaintiff without *any need* for prior discovery, the Court held that even though "ordinary pleading rules are not meant to impose a great burden upon a plaintiff," to require some allegations identifying the plaintiff's theory of loss causation "*should not prove burdensome* for a plaintiff who has suffered an economic loss." *Id.* (emphasis added). The absence of any genuine *burden* from such a requirement was the pivotal premise of this Court's reasoning in *Dura*. By contrast, to require an antitrust plaintiff to persuade a district court through facts required to be pleaded in great detail that a conspiracy in fact occurred — the details of which would be "in the hands of the conspirators," as recognized by the Court in *Hosp. Bldg.* and *Poller* — would impose just the sort of "burdens" that the Court recognized in *Dura* must *not* be imposed on a motion to dismiss. When fairly read, *Dura* in fact undermines Petitioners' arguments, which is seemingly the way *Dura* was read by the Second Circuit. *See* Pet. App. 12a-13a (the Second Circuit citing *Dura* and quoting its pivotal "burden" language).

C. Petitioners' argument that their proposed heightened pleading standard merely reflects "complexity of the underlying substantive law" already has been rejected in principle by the Court.

Because *Leatherman* and *Swierkiewicz* have so clearly barred judicially-created "heightened pleading standards" of the type now urged by Petitioners and their amici, they attempt to do an "end-run" around *Leatherman* and *Swierkiewicz*, by arguing

that what they urge is not a "heightened pleading standard" at all, but instead only reflects that the degree of required factual specificity varies according to the complexity of the underlying substantive law.[14] However, precisely this same argument was made, and rejected by the Court, in *Leatherman*. "According to respondents," the Court wrote in *Leatherman*, "the degree of factual specificity required of a complaint by the Federal Rules of Civil Procedure *varies according to the complexity of the underlying substantive law*." 507 U.S. at 167 (emphasis added). "But examination of the Fifth Circuit's decision in this case makes it quite evident that the 'heightened pleading standard' is just what it purports to be: a more demanding rule for pleading a complaint under §1983 than for pleading other kinds of claims for relief." *Id.*

Just so here. Petitioners' sophistry notwithstanding, the legal standard that they urge to the Court would be a more demanding rule for pleading a complaint for antitrust conspiracy than for other claims. As such, it is a "heightened pleading standard" that is plainly contrary to both *Leatherman* and *Swierkiewicz*, as well as to fundamental principles that have governed for nearly half a century since *Conley*.[15] Indeed, Petitioners could not be clearer in arguing that the District Court's analysis was correct, in holding that there is a so-called "plus factors pleading requirement." Pet. App. 42a, 45a. To suggest that a "plus factors pleading requirement" would not be a "heightened pleading requirement" is a stark contradiction in terms.

---

14. *E.g.*, SG Br. 7, 12 (asserting that the required degree of specificity "depends on the context and complexity of the case"); MC Br. 10-11 (it "depends on the substantive claims being asserted").

15. Evidently recognizing that this language from *Leatherman* conflicts with his argument, the Solicitor General drops a footnote purporting to argue that he is not advocating a heightened pleading standard here, but only a "context-specific inquiry." SG Br. 12 n.4. However, since he plainly advocates a broad requirement of greater particularity for antitrust conspiracy claims than other claims, this is mere word play, and a distinction without a difference.

D. Burdens of undue discovery are better managed in other ways than through *ad hoc* judicial "heightened pleading requirements."

Rule 26 of the Federal Rules of Civil Procedure, and the Manual for Complex Litigation, provide ample means of limiting discovery burdens directly, without any need for courthouse doors to be effectively barred through judicially-erected, *ad hoc* "heightened pleading requirements." Indeed, this Court has repeatedly made clear that other available tools are preferable as means of weeding out meritless claims. *See Swierkiewicz*, 534 U.S. at 512-13, 514 (the Federal Rules rely "on liberal discovery rules and summary judgment motions to define disputed facts and issues"); *Crawford-El*, 523 U.S. at 598-600; *Leatherman*, 507 U.S. at 168-69; *Conley*, 355 U.S. at 48 n.9. The Second Circuit makes the same point below. Pet. App. 29a n.12.

Importantly, procedures proposed by the Plaintiffs in this very case, after the Second Circuit's decision and before the petition for certiorari was filed, vividly illustrate the availability of practical procedures to limit undue discovery burdens. With support at least in principle from two of the Petitioners, Plaintiffs formally proposed to the trial court, in February 2006, that a process of "phased discovery" be considered, entailing a first phase of discovery limited to the existence of the alleged conspiracy and class certification, with more expansive, general discovery to follow only if the Plaintiff's class claims survive an early summary judgment motion under *Matsushita*.[16] That proposal is one illustration of various procedures that could prevent unnecessarily massive discovery burdens of the type that Petitioners' hypothesize.

Tellingly, however, while two Petitioners supported consideration of such a proposal, any such "phased discovery"

16. Joint Scheduling Conference Submission of Plaintiffs and Defendants BellSouth Corporation and Qwest Communications International, Inc., dated February 22, 2006 (Docket No. 84 in District Court). A request has been made under Rule 32(3) to lodge this document with the Court. Petitioners have stated that they have no objection.

was emphatically opposed by the two largest Petitioners.[17] A fair inference from that opposition is that the purpose of those Petitioners was *to burden the Plaintiffs* with expansive, single-phase discovery, in order to complicate and frustrate efforts on Plaintiffs' part to achieve narrowly-targeted, efficient and limited discovery into the question of conspiracy. Especially in view of the active opposition by the two largest Petitioners to this reasonable "phased discovery" proposal, their professed fears that expensive discovery calculated to bring about a "nuisance settlement" is the Plaintiffs' objective in this case should meet with due skepticism. Indeed, it is telling that while Petitioners' amici complain of a theoretical "asymmetry" between discovery burdens to plaintiffs and defendants (*e.g.*, Legal Scholars Br. at 16), in practice the largest of the Petitioners have vigorously resisted good faith efforts, on the part of Respondents and the other two Petitioners, to limit discovery burdens by using recognized and practical case management tools.

E. Petitioners' radical proposal, to apply *Matsushita* on a Rule 12 (b)(6) motion, is utterly inconsistent with the Court's precedents.

Petitioners' proposal to apply *Matsushita* at the Rule 12(b)(6) stage is precisely analogous to the proposal, rejected in *Swierkiewicz*, that the same thing be done with summary judgment standards applicable in employment discrimination cases under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Both standards are flexible summary judgment standards calculated to assist the courts in determining whether inferential cases – of conspiracy, in *Matsushita*, and of discriminatory purpose, in *Swierkiewicz* – are reasonable in the context of all the facts of a case. Neither standard needs to be satisfied at trial if direct evidence is available instead, and if the inferential case with which they deal is therefore

17. Letter from Kellogg, Huber, Hansen, Todd, Evans & Figel, LLP, dated February 22, 2006, with enclosed proposed Civil Case Management Plan (Docket No. 104 in District Court). A request has been made under Rule 32(3) to lodge this document with the Court. Again, Petitioners have no objection.

unnecessary. The respective roles of the two standards in question are so closely parallel, that the reasoning of *Swierkiewicz* is easily transposed to this case in all pertinent respects. Petitioners' argument thus could not be more clearly at odds with recent precedent.

The Solicitor General takes pains to disavow Petitioners' radical *Matsushita* proposal. SG Br. 22-23. In disavowing Petitioners' position, the Solicitor General accords with views expressed, for example, by Professor Arthur Miller. Miller, 78 N.Y.U. L. Rev. at 1073-74 (any trend toward applying *Matsushita* summary judgment standards on a motion to dismiss "not only would be unfortunate, but would be completely inconsistent with the philosophy and principles of the Federal Rules in general and the pleading rules in particular."). Moreover, other than the District Court in this case, *all* courts that have considered the issue since *Swierkiewicz*, in antitrust conspiracy cases like this one, have uniformly concluded that the principles articulated by the Court in *Swierkiewicz* and *Leatherman* foreclose the same *Matsushita* standard that that Petitioners urge be adopted in antitrust conspiracy cases. Pet. App. 26 n.9 (discussing four recent antitrust cases applying *Swierkiewicz* to foreclose application of a *Matsushita* standard at the Rule 12(b)(6) stage).

Relying on summary judgment standards from *Monsanto* and *Matsushita*, Petitioners' essential argument is that whenever "there is an evident, common-sense unilateral explanation for the conduct" alleged in a complaint, "the complaint does not state a claim of conspiracy" – apparently even if the complaint's allegations make it equally or even more plausible to suggest based on the complaint's allegations that a conspiracy occurred. Pet. Br. 30. Such an unprecedented pleading standard would make no sense at all from a policy standpoint.

Given that damages to the public from an antitrust conspiracy generally are in the hundreds of millions of dollars, while attorneys' fees even to litigate a case *fully to conclusion* are vastly less, it makes no sense to run the risk of "false

negatives" in half (or even more) of the cases in which competing inferences might reasonably be drawn from a complaint's allegations. As we have previously explained in our opposition to certiorari (at 17-18), the standard of "excluding the possibility of independent action" in *Matsushita* is calibrated to the completely different context of summary judgment after discovery, when a plaintiff has fully collected his evidence, and when the magnitude of the risks from "false positives" in a jury trial is vastly greater than the mere legal fees at stake on a motion to dismiss. To transpose *Matsushita* standards to the entirely different Rule 12(b)(6) context would unbalance the concerns expressed by the Court in *Matsushita* itself, where the Court made clear that mistaken inferences of liability "must be balanced against the desire that illegal conspiracies be identified and punished." 475 U.S. at 594. As we explained in our opposition to certiorari, such a standard also would impose unrealistic expectations on jurists, who cannot be expected to develop well-informed judgments about precise likelihoods of contrasting, reasonable inferences without the benefit of any expert testimony, or evidence from the files of those who actually work in the business at issue and are familiar with its inner workings. Opp. Cert. 16-17.

Equally importantly, from the standpoint of very basic principles, the standard urged by Petitioners would stand conventional Rule 12(b)(6) standards on their head. Since the gist of *Matsushita* is that a plaintiff on summary judgment must offer evidence that "tends to exclude the possibility" of independent conduct (475 U.S. at 588) — *i.e.*, that the defendant receives the benefit of ambiguous inferences on such a motion — to apply *Matsushita* standards on a motion to dismiss would diametrically reverse the established rule that the plaintiff gets the benefit of such inferences on a motion to dismiss. This precise point of conflict with conventional pleading standards is one of the bases for the Eleventh Circuit's refusal to accept an argument that challenged behavior was not in fact contrary to the defendants' independent self-interests, as the plaintiffs had alleged that it was, in the *NHL* case, upon which Petitioners and their amici relied heavily in their Petition. 419 F.3d at 475-76. *See* Opp. Cert. 12, 15 n.7.

F. The less radical proposal made by the Solicitor General also conflicts with the Court's precedents.

Rather than joining in the hopeless position advocated by Petitioners, the Solicitor General seeks to fashion, from the "reasonably founded hope" language of *Blue Chip Stamps* and *Dura*, a new, substituted requirement that the allegations of a complaint for antitrust conspiracy must establish "a reasonable basis for inferring that the defendants may have engaged in wrongful conduct." SG Br. 10-11, 11-12. That language is minted anew in the Solicitor General's brief, and is nowhere to be found in any prior decision of this Court or any Court of Appeals. The Solicitor General's proposal has at least two distinct aspects – relating to issues of *persuasiveness* and *specificity* – which are separately discussed below.

1. As to persuasiveness, only a reasonable *possibility* of wrongful conduct is necessary.

To the extent the Solicitor General's proposed pleading standard would require only an inference that the defendants "may have engaged" in the alleged conspiracy, and not that they "did engage" in it (SG Br. 10-11, 11-12), its requisite degree of certainty may not differ materially from the standard of *Conley*, *Blue Chip Stamps* and *Dura*, which likewise requires only a reasonable *possibility* – and *not* a predominance of likelihoods, or a certainty – that the claim will be supported by evidence yet to be uncovered through discovery.

Elsewhere in his brief, however, the Solicitor General uses significantly altered language, which seems to suggest that the bar should be raised higher. For example, significantly altering the "reasonably founded hope" language of *Dura* – which requires only a reasonable "hope" and not a reasonable "expectation" – the Solicitor General elsewhere repeatedly suggests that there must be "a reasonably grounded *expectation* that discovery *will* reveal evidence of an illegal agreement." SG Br. 8, 23 (emphasis added). To the extent that the Solicitor General's own words ("expectation" and "will") would require a higher degree of confidence than a reasonable *possibility* – the Solicitor General's words seeming to suggest a necessary

probability of conspiracy of at least 50 per cent or perhaps even more — they are plainly inconsistent both with the *Conley* standard, and with the reasonably founded "hope" language of *Blue Chip Stamps* and *Dura*.[18]

Such an "expectation of prevailing" standard also would conflict with other leading precedents. In *Scheuer v. Rhodes*, 416 U.S. 232 (1974), the Court made clear that it is *not* the proper function of a motion to dismiss under Rule 12(b)(6) to determine whether a plaintiff has a reasonable expectation that he "will" ultimately prevail:

> The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.

416 U.S. at 237. In *Swierkiewicz*, the Court *twice* quoted this language, reaffirming it as one of "the ordinary rules for assessing the sufficiency of a complaint." 534 U.S. 511, 515. Thus, this Court has made inescapably clear, repeatedly and recently, that any suggestion that the courts should determine on a motion to dismiss whether there is a reasonable expectation that the plaintiff "will" prevail in establishing its claim is indefensible. The Solicitor General suggests that such uninformed and summary handicapping of a plaintiff's odds of prevailing is necessary in order to prevent "costly litigation" (SG Br. 9), but this Court has made very clear, in such cases as *Scheuer*, *Leatherman* and *Swierkiewicz*, that such fears are *not* the determinants of basic pleadings standards under Rule 12(b)(6).

---

18. ABA uses the different phraseology that what should be required is "a reasonable basis to believe there is an agreement." ABA Br. 3, 9. Unlike the Solicitor General, ABA does not profess to find actual support for that language in any of this Court's existing precedent. It seems unclear from ABA's choice of language whether a reasonable possibility that a conspiracy exists would be sufficient under its proposal, or whether an apparent preponderance of likelihoods (*i.e.*, a probability equal to or greater than 50 per cent) would be necessary.

2. Simple and concise factual allegations cannot properly be ignored on the basis that they are "conclusory."

The Solicitor General's proposed pleading standards plainly would change existing law, to the extent they would require that only facts alleged with great specificity in the complaint can be considered, in determining whether there is a reasonable possibility that defendants "may have engaged" in the asserted wrongful conduct. SG Br. 8, 11, 14-15, 26, 28-29 (resting his analysis heavily on an assertion that any allegations that one might call "conclusory" must be entirely "disregarded" and "put to one side," including various simple factual allegations). This proposed requirement of heightened specificity in the complaint is inconsistent not only with the Court's precedents, but with the mandate of Rule 8(e)(1) that allegations "shall" be "simple" and "concise."

In *Swierkiewicz*, the Court emphasized that Rule 8 is intended to embody only "simple requirements," analogous to those illustrated by the forms annexed to the Federal Rules of Civil Procedure, except in those cases in which Rule 9(b) explicitly requires greater specificity. 534 U.S. at 513 & n.4. Likewise, in *Leatherman*, the Court approvingly quoted from *Conley*:

> The Federal Rules of Civil Procedure *do not require a claimant to set out in detail the facts upon which he bases his claim*. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

507 U.S. at 168 (emphasis added), quoting from *Conley*, 355 U.S. 47. Thus, the essential contention of Petitioners and the Solicitor General that an antitrust conspiracy claimant must set out in detail the facts upon which he bases his claim has been rejected, definitively and repeatedly, by the Court.

Surprisingly, Petitioners make a tortured effort to contend that *Conley* holds otherwise. Entirely distorting *Conley*,

Petitioners conclude their discussion of applicable pleading standards with the pretense that *Conley* itself suggests a plaintiff must allege "'specific facts' in support of its 'general allegations of discrimination.'" Pet. Br. 28-29. But this is exactly the *opposite* of what *Conley* says. 355 U.S. at 47. That Petitioners find it necessary to stand *Conley* on its head to support their arguments merely dramatizes their indefensibility under established law.

Another purported basis in the Court's case law for the particularity requirement urged by Petitioners and their amici is *Papasan v. Allain*, 478 U.S. 265 (1986). *See* Pet. Br. 12, 18; SG Br. 14; MC Br. 11.[19] However, in *Papasan*, the allegation that the Court held could be disregarded on a motion to dismiss was an exceptionally naked "legal conclusion" – *i.e.*, that the plaintiffs' had been deprived of "a minimally adequate education." 478 U.S. at 286. What constitutes "adequate" education is entirely a matter of opinion, not fact. Because nothing was alleged that could give any meaning or factual content to that mere expression of opinion – such as that the children were "not taught to read or write" or "that they receive no instruction on even the educational basics" (*id.*) – the Court held that the mere "legal conclusion" could be disregarded. That is a far cry from any holding that simple and concise factual assertions made in accordance with Rule 8(e)(1) should be disregarded, to the extent that they are not also backstopped by still more granular allegations of fact made in greater detail. As this case well illustrates, such a *reductio ad absurdum* would rapidly lead to the discarding of nearly any "simple" and "concise" allegations in a complaint, because factual allegations, if they are to be "simple," will often necessarily be characterizable in some degree as "conclusory."[20] With such a change, vast judicial energies

19. Petitioners also profess to rely on *Anza v. Ideal Steel Supply Co.*, 126 S. Ct. 1991 (2006). Pet. Br. 18-19; SG Br. 14. However, *Anza* did not involve an insufficiency of specificity in pleading. Instead, the Court merely concluded that the plaintiff's clear theory of causation was defective as a matter of law. Thus, *Anza* has no bearing on applicable pleading standards.

20. 5 Wright & Miller, § 1218 at 265 (2004)(attempts to separately compartmentalize "ultimate facts," "evidence" and "conclusions" have

(Cont'd)

would come to be consumed by difficult determinations whether allegations are "facts" or "conclusions," while pleadings would balloon in size and impenetrability in order to avoid risks of dismissal of simple and concise but arguably "conclusory" allegations. This Court has rightly rejected reasoning like that of Petitioners in order to prevent such trends. *Employing Plasterers*, 347 U.S. at 188-89 (rejecting a proposed distinction between "allegations of fact" and "mere conclusions of the pleader" and holding that in antitrust cases "where a bona fide complaint is filed that changes every element necessary to recover, summary dismissal of a civil case for failure to set out evidential facts can seldom be justified"); 5 Wright & Miller, § 1218 at 267 (in *Employing Plasterers* the Court "laid to rest any lingering doubt as to the propriety of 'conclusions' in a pleading.")

For example, the simple factual allegations that were identified by the Court as missing in *Papasan* — that children were not "taught to read or write" or "that they receive no instruction on even the educational basics" (478 U.S. 286), could at least as easily be dismissed as being "conclusory" as many of the simple and concise factual allegations made in the complaint in this case. Indeed, to entirely eliminate all colorably "conclusory" character from factual allegations, a plaintiff would be required to plead to at least an *evidentiary* level of detail. This Court squarely held, in *Employing Plasterers*, that no such evidentiary detail in pleading is necessary in antitrust cases.[21]

(Cont'd)
proven through lengthy experience to be "a chimera," and it is "difficult, if not impossible, to draw meaningful and consistent distinctions between or among 'evidence', 'facts' and 'conclusions'. These concepts tended to merge to form a continuum and no readily apparent dividing markers developed to separate them.").

21. *See also, Radovich*, 352 U.S. at 454 ("[T]his Court should not add requirements to burden the private litigant beyond what is specifically set forth by congress in those [antitrust] laws"). To suggest otherwise Petitioners rely upon *Davis v. Passman*, 442 U.S. 228, 238 n.15 (1979). Pet. Br. 22. However, the language that they quote out of context from *Davis* was merely included by the Court in a broader quote from a commentator, when the Court itself was merely making a different point relating to the phrase "cause of action." *Id.* at 238.

In an attempt to argue otherwise, Petitioners and their amici repeatedly recycle two snippets of language taken out of context from *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983) ("*AGC*").[22] However, the issue in *AGC* was whether the Ninth Circuit properly had read a complaint, which in fact alleged coercion merely to *include* non-union contractors in competitive bidding, as though it had alleged coercion to include *only* non-union contractors. *Id.* at 526 n.9. Because there is a vast logical gulf between the degrees of restraint that such different allegations would entail, the Court found the Ninth Circuit to have assumed "that the defendants have violated the antitrust laws in ways that have not been alleged." *Id.* at 526. That is not a holding that one must plead detailed evidence in order *further* to substantiate all "simple" and "concise" factual allegations. Instead, it was a question of *changing* the facts alleged in the complaint to something altogether different.

The other snippet from *AGC* that Petitioners and their amici repeatedly quote is its statement that "a court must retain the power to insist upon some specificity in pleading." 459 U.S. at 528 n. 17. However, the Court in that footnote was referring to the district court's powers — which had *not* been exercised there, just as they have *not* been here — to require a more definite statement pursuant to Rule 12(e). Far from supporting Petitioners' arguments on a 12(b)(6) motion, that language affirmatively undermines them, since a district court's powers under Rule 12(e) have been emphasized by the Court repeatedly as one of the most important *alternatives* to heightened pleading standards. *See* p. 25, *supra*.

The types of allegations that courts previously have held to be "bare-bones" allegations of conspiracy insufficient to satisfy Rule 8(a) present so stark a contrast with the allegations made here, that cases involving "bare bones" allegations tend

22. The Brief of the Chamber of Commerce, etc. in Support of Petitioners ("COC Br.") backstops the *AGC* snippets with *Newport News Shipbuilding & Dry Dock Co. v. Schauffler*, 303 U.S. 54 (1938). *See* COC Br. 11. But proceedings in that case predated the Federal Rules of Civil Procedure.

only to confirm the sufficiency of the allegations here by way of contrast. *Cf.* Pet. Br. 21. Like the District Court, Petitioners rely heavily on *Heart Disease Research Found. v. General Motors Corp.*, 463 F.2d 98 (2d Cir. 1972). However, the complaint in that case was so inane – basing jurisdiction, for example, on "the 'general welfare' provisions of the United States Constitution" and on a non-existent "Environmental Quality Act" – that the District Court not only dismissed the complaint but sanctioned the plaintiff under Rule 11. On appeal, the Second Circuit characterized the plaintiff's nonsensical lawyering as "typical of the sloppy, scattershot matter in which this complaint was thrown together," and observed that "there is a limit to how much a court may be called upon to divine in assessing the sufficiency of the complaint before it." *Id.* at 100. To rely heavily on cases of that character as the basis for dismissing the "simple" and "concise" allegations made here, as the District court did and as Petitioners urge, is a procedural "leap to the moon." [23]

G. The supposed "parallel conduct is enough" standard that Petitioners' amici posit is a mere straw man, and any standard that hinges on whether conduct might be called "parallel" would be inappropriate.

Petitioners and their amici repeatedly mischaracterize the Second Circuit's opinion below as though it held that "parallel

23. *See also, Tal v. Hogan*, 453 F.3d 1244, 1261 (10th Cir. 2006) ("bid-rigging" phrase amid assertions that a development proposal was "collusive, fabricated, and non-competitive" was "nothing more than claiming that the defendants violated 'the antitrust laws'" and was mere "buzz-words," when one of the alleged conspirators "had no economic interest" that could have motivated her to collude); *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213 (4th Cir. 1994) (claim asserted only that "a single real estate foreclosure" was result of "conspiracy" and thus unlawful); *Lombard's Inc. v. Prince Mfg., Inc.*, 753 F.2d 974 (11th Cir. 1985) (resale price maintenance claim did not identify conspirators and only fact alleged was one persons' refusal to sell to plaintiff). Tellingly, *Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648 (1999), upon which amici curiae Legal Scholars also rely (at 14), "cannot be considered authoritative after *Leatherman*." *Hammes*, 33 F.3d at 781.

conduct" will *always* be enough to sustain a complaint for horizontal antitrust conspiracy. However, since that is not what the Second Circuit in fact said, most of the broad arguments made by several of Petitioners' amici are simply misdirected. *E.g.*, Economists' Br. (attacking in the abstract a supposed "parallel conduct is enough" standard – on grounds that traditional parallel conduct, such as mere pricing "in similar ways" over time, would not support a plausible inference of conspiracy – but not purporting to opine on anything even resembling the *particular parallelism*, asserted here, of non-competition by ILECs with one another as CLECs). Indeed, the amicus curiae economists provide a long list of wholly abstract types of conduct that might be called "parallel" (Economists Br. 15), as though the Second Circuit had held that *any* allegation that such "parallel" conduct occurred would *necessarily* satisfy *Conley's* legal standard. But that utterly mischaracterizes the Second Circuit's opinion.

As to whether *any* allegation of parallel conduct might be sufficient to defeat a motion to dismiss, the Second Circuit in fact *rejected* any hard-and-fast rule, recognizing that not all conduct that might be argued to be "parallel" *ipso facto* has the same probative value. Instead of reasoning rigidly based on whether conduct might be said to be "parallel" or not, the Second Circuit sensibly held that courts should look to "*the particular parallelism asserted*," to determine whether it "plausibly" may be the result of a conspiracy. Pet. App. 25a (emphasis added). The Second Circuit's opinion does not hold that parallel conduct *always* will suffice to state a plausible claim of conspiracy, but only that in view of the "particular parallelism asserted" it "*can suffice*" to do so. *Id.* (emphasis added).[24] In other words, the mere fact that alleged conduct by the defendants might reasonably be characterized as "parallel" does not necessarily mean as a matter of law that it *cannot* be suggestive of a plausible conspiracy.

---

24. Petitioners and their amici recast this language as though it held that any parallelism necessarily "does suffice" rather than merely that parallel conduct "can suffice," but the Second Circuit's opinion never says that.

This is necessarily so, since it is easy to conceive of conduct that could be called "parallel" but that nonetheless *would* be strongly suggestive of conspiracy. For example, complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason, obviously could be highly suggestive of conspiracy. The fact that such conduct could be called "parallel" does not *ipso facto* mean that it is *not* suggestive of conspiracy.

Far from adopting a wooden "parallel conduct is enough" standard like that posited by Petitioners and their amici, the Second Circuit's opinion unambiguously requires that an alleged conspiracy must be a "plausible" one, and that it must be accompanied by allegations of fact putting the defendants on fair notice of the conspiracy's nature and asserted effects. In other words, the alleged factual predicate "does need to include conspiracy among the realm of plausible possibilities." *Id.* at 19a, 25a. "If a pleaded conspiracy is implausible on the basis of the facts as pleaded – if the allegations amount to no more than 'unlikely speculations' – the complaint will be dismissed." *Id.* at 20a. In formulating this standard, the Second Circuit borrowed much of its phraseology directly from the First Circuit's decision in *DM Research*, which was the Circuit Court decision that Petitioners themselves most heavily relied upon below (just as they continue to do here). As shown in Part III.A above, however, that language from *DM Research* is consistent conceptually with this Court's phraseology in *Conley*, *Blue Chip Stamps* and *Dura*.

Many cases involving asserted "parallel conduct" are likely to fail under the Second Circuit's standard. In some cases, just as in *DM Research*, there will be no "plausible" motive for defendants to have conspired to engage in the type of conduct alleged. In others, for any of a variety of reasons (such as small collective market shares of the alleged conspirators, or a clear absence of opportunities to conspire), aspects of the market's structure may make the notion of a conspiracy of the type alleged inherently "implausible." Timing considerations unique to a case also may make the

asserted conspiracy "implausible." For example, after its decision below, the Second Circuit held in another case that the requirement of "plausible" factual allegations to support a conspiracy allegation was *not* satisfied, in light of the length of time that passed between the time of the alleged conspiracy and the time of actions allegedly taken in furtherance of it. *In re Tamoxifen Citrate Antitrust Litig.*, 429 F.3d 370, 402 (2d Cir. 2005)(affirming dismissal under Rule 12(b)(6) because "the pleaded conspiracy seems to us to be 'implausible.'"). *See also, Altieri v. Albany Public Library*, 2006 U.S. App. LEXIS 2725 at **4-5 (2d Cir. Feb. 1, 2006).

Although one cannot identify in advance all fact patterns that might render an alleged conspiracy "implausible," the type of fact-sensitive reasoning exemplified by *Tamoxifen* illustrates the undesirability of a rigid rule based on whether conduct is "parallel" or not. A more flexible and sensible pleading standard – like those adopted by the Second Circuit below and expressed by this Court in *Conley* and *Blue Chip Stamps* – rightly turns instead on whether there appears to be a reasonable *possibility* (or a "reasonably founded hope") that discovery may unearth evidence of the alleged conspiracy.

H. To adopt any standard that hinges on whether "plus factors" have been pleaded also would be inappropriate.

Some of Petitioners' amici advocate a pleading standard for antitrust conspiracy cases that would make sufficiency of the complaint depend on whether "plus factors" have been pleaded. However, any such rigid requirement would foster confusion and not enlightenment. Essentially this same point is made by the Court in *Swierkiewicz*, with regard to the requirements of a "prima facie case" of employment discrimination under *McDonnell Douglas*. As the Court stated in *Swierkiewicz*, the requirements of such a prima facie case "can vary depending on the context and were 'never intended to be rigid, mechanized, or ritualistic'." 534 U.S. at 512. "Given that the prima facie case operates as a flexible evidentiary standard," the Court in *Swierkiewicz* wrote, "it should not be

transposed into a rigid pleading standard for discrimination cases." *Id.*

In the same way here, to transpose "plus factor" summary judgment analysis woodenly into a rigid Rule 12 (b)(6) pleading standard turning on whether "plus factors" have been alleged would be unwise. Interestingly, some of Petitioners' amici agree with us in this respect.[25] Instead, the touchstone for the governing legal standard should be what degree of evident probability should be required that actionable conduct occurred. As shown in Part III.A above, under established case law, a reasonable possibility should suffice, and neither a predominance of probabilities nor a certainty should be required. The Second Circuit therefore rightly eschewed any rigid "plus factors pleading requirement" – even while correctly recognizing that the plaintiffs in this particular case have clearly pleaded "plus factors." Pet. App. 32a n.15.

IV. The Allegations In This Case Satisfy Rule 12(b)(6).

A. The allegations made here amply satisfy *Conley*.

The complaint in this case not only satisfies Rule 8(a)'s requirements of a "short and plain" statement of the claim consisting of "simple" and "concise" allegations pursuant to Rule 8(e)(1), but goes far beyond that, including numerous "plus factors." We exhaustively described the specific allegations in our opposition to certiorari, and will not repeat that full description here. *See* Opp. Cert. 19-28. The Second Circuit explicitly found that the complaint's allegations were sufficient, in a detailed and well-reasoned analysis. Pet. App. 4a-7a, 30a-33a. Indeed, even the Solicitor General, while

---

25. *See* Legal Scholars Br. 25:

> Amici recommend this Court not simply adopt the doctrine of 'plus factors' from the courts of appeals. Plus factors are a vague amalgam of matters, all of which are relevant in the Evidence Rule 401 sense to the question of conspiracy, but which often fail to rise to the level of 'tending to exclude the possibility' of unilateral conduct.

advocating a higher legal standard than the one that controls under existing law (*see* Part III.F.1 above), repeatedly states that it is a "close question" whether this case would satisfy even his own proposed *higher* legal standard. SG Br. 8, 26. However, under the established principle that a complaint should be construed "liberally in accordance with the mandate in Rule 8(f) and the general spirit of the federal rules," 5 Wright & Miller, §1215 at 195 (citing cases), such "close questions" should be resolved in a plaintiff's favor, and not in favor of the defendants.

B. The arguments being offered to attack Respondents' allegations are themselves seriously flawed.

Nothing could better demonstrate the degree to which Plaintiffs' allegations actually satisfy controlling legal standards than the extraordinary contortions that the District Court, Petitioners and their amici have found it necessary to resort to, in order to attempt to argue otherwise.

1. This case was not begun to circumvent the Court's decision in *Trinko*.

Attempting to prejudice the Court's analysis on the merits, Petitioners present an anachronistic account of the events that led to this case, transparently attempting to insinuate that this case was commenced *after* this Court's decision in *Trinko*, in order to circumvent the Court's holding in *Trinko* with regard to monopolization claims under Section 2 of the Sherman Act. Pet. Br. 5-6. This gambit has evidently carried the day with Petitioners' amici, who show manifest confusion about the actual timing of events.[26] In fact, however, the horizontal conspiracy claims asserted in this case were first filed on December 23, 2002, well over a year *before* the Court decided *Trinko*. JA-1. Indeed, even the District Court's opinion in this

26. COC Br. 4 (asserting that "Plaintiffs abandoned their monopolization claim . . . then turned to" a Section 1 claim); Legal Scholars Br. at 4 ("The claims became claims of conspiracy not to compete after this Court held, in *Trinko*," *etc.*).

case, dated October 8, 2003 (JA-4), preceded the Court's *Trinko* decision by more than three months. The Court did not even grant certiorari in *Trinko* until March 10, 2003 – nearly four months *after* the first complaint was filed in this case for conspiracy under Section 1 of the Sherman Act. It was by no means clear before certiorari was granted in *Trinko* that it would be granted, much less how this Court ultimately might rule in the case. Any notion that the horizontal conspiracy claims in this case were conceived as some sort of device to circumvent *Trinko* thus ascribes gifts of prophesy to Respondents and their counsel.

Nor do the events that led to this case suggest any impropriety. Counsel for the Plaintiffs in this case include counsel who represented the plaintiffs in *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000), in which the Seventh Circuit held that failure by an ILEC to comply with the requirements of the Telecommunications Act could not provide the basis for monopolization claims against the ILEC, under Section 2 of the Sherman Act. After *Goldwasser*, Respondents' counsel were approached in 2000 or 2001 by CLEC competitors of Petitioners, to consult about possibilities of representing CLECs in litigation against certain of the Petitioners. Those discussions led Respondents' counsel to develop further knowledge, in addition to that developed in *Goldwasser*, concerning allegedly wrongful conduct by Petitioners. Ultimately, Respondents' counsel chose not to undertake the representation of those CLECs in litigation against the Petitioners based upon such conduct.

In 2002, however, the Second Circuit issued its decision in *Law Offices of Curtis V. Trinko v. Bell Atlantic Corp.*, 305 F.3d 89 (2d Cir. 2002), which disagreed with *Goldwasser*, and strongly supported a view that viable consumer class actions could be brought against Petitioners for monopolization under Section 2 of the Sherman Act, based on the "essential facilities" doctrine and otherwise. In the wake of the Second Circuit's *Trinko* decision, and with knowledge of relevant events that had been developed in *Goldwasser* and through discussions with CLECs, Respondents' counsel represented class action

plaintiffs who brought claims under Section 2 of the Sherman Act against each of Verizon, SBC and BellSouth, in federal courts in New York, Connecticut and Atlanta, respectively, during the late summer and fall of 2002. In their complaints in those cases, the plaintiffs did not assert claims for horizontal conspiracy under Section 1 of the Sherman Act, because no such claims had been at issue in *Goldwasser* or *Trinko*.

After the commencement of those cases, Respondents' counsel engaged in further investigation with regard to the possibility of additional antitrust claims on behalf of consumer class plaintiffs against the Petitioners. During the fall of 2002 – and especially after the Section 2 cases against Petitioners had been commenced – Respondents' counsel were approached by certain persons who discussed with counsel whether conduct that was the subject of the pending Section 2 monopolization cases may have been undertaken by Petitioners in unlawful collusion with one another. Counsel for Respondents met with such persons during late 2002, and began to consider and investigate whether such suggestions might properly provide a basis for additional legal claims for horizontal conspiracy to restrain competition, in violation of Section 1 of the Sherman Act.

Those investigations were unexpectedly brought to a head on or about December 19, 2002, when a telecommunications industry acquaintance of Respondents' counsel provided a copy of a letter written by Congressmen Conyers and Lofgren to U.S. Attorney General John Ashcroft, dated December 18, 2002, in which they demanded that an investigation be commenced into appearances that unlawful collusion of the type alleged in this case may have occurred. *See* JA-46-49. That letter contained significant factual detail, and identified various factors reasonably supporting the likelihood of such collusion. *Id.* Coupled with the results of their investigations in prior months, Respondents' counsel concluded that the detailed analysis offered in that letter provided a sufficient basis for the commencement of a claim against Petitioners under Section 1 of the Sherman Act. It is no accident that the original complaint in this case was filed four days later, on

December 23, 2002. Thus, the case obviously was not commenced to "circumvent *Trinko*." Instead, the case followed the emergence of grounds to believe that Petitioners' conduct may very well be the result of unlawful collusion.

2. The District Court's analysis failed to accept Respondents' allegations as true.

The District Court erred below, by explicitly applying a "plus factors pleading requirement" that it took out of its appropriate context from the summary judgment standards of *Matsushita*. Pet. App. 41a-42a. As the Second Circuit pointed out in its opinion, even if such a "plus factors pleading requirement" existed – although it does not – the allegations in the complaint here would satisfy it, since plaintiffs simply and concisely allege that the defendants engaged in conduct that would have been against their self-interest in the absence of a conspiracy. Pet. App. 32a n.15. The District Court concluded otherwise, but did so only by violating the basic principle, reaffirmed by the Court as recently as 2006, that the courts must "accept as true the factual allegations in" a complaint. *Anza*, 126 S. Ct. at 1994 (citing *Leatherman*).[27] Thus, as the centerpiece of its factual analysis, the District Court labeled certain of Plaintiffs' key factual allegations as "assumptions," even though they are really simple and concise factual allegations.[28]

The Complaint specifically alleges – citing and quoting supporting industry commentary – that the ILEC in an adjacent territory is "best situated" to compete in its neighbors'

27. *Accord, Swierkiewicz*, 534 U.S. 508 n.1; *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 171 (2005); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999).

28. *See* Pet. App. 51a-53a (repeatedly characterizing explicit factual allegations by Plaintiffs about the functioning the relevant marketplace as "assumptions" rather than facts (Pet. App. 51a-52a), and then proceeding to reject them on the basis that they are "undermined" by other considerations having scant support (*id.*), from which the District court then derived "implications" directly contrary to Plaintiffs' factual allegations (Pet. App. 52a-53a)).

service areas. JA-20, ¶ 38. In the same vein, it alleges as to "surrounded territories" – which are detailed pictorially in color illustrations attached to the complaint – that "the service of such surrounded territories presents the RBOC serving surrounding territories with an especially attractive business opportunity," and that in competing as a CLEC in such neighboring territories, an ILEC acting as a CLEC would have "substantial competitive advantages." JA-21-22, ¶¶ 40-41. The District Court swept away these key factual allegations with a string of *ipse dixits*, asserting that "ILECs who attempt to become CLECs in another ILEC's territory have little competitive advantage over other CLECs" (Pet. App. 52a), that "an ILEC acting as a CLEC is in substantially the same position, and must undertake the same economic calculus, as any other CLEC" (Pet. App. 53a), and that "the ILEC-as-CLEC is not different from any other CLEC with respect to its entry into new markets." Pet. App. 54a. Not only are these central premises of the District Court's opinion directly contrary to simple and concise factual allegations made in the complaint – as well as being dubious at best as a matter of common sense – but the District Court's opinion cites no evidence or authority to support them.

Plaintiffs' allegations that adjacent ILECs are "best situated" to compete as CLECs, and that such competition would have been "an especially attractive business opportunity" for which they would have had "substantial competitive advantages" in the absence of a conspiracy, cannot reasonably be dismissed as being wholly "implausible," particularly in light of: (i) Defendants' own complaints to Congress that the rates a CLEC is required to pay an ILEC to least its network components are below-cost and unfair (JA-21, ¶ 39; *see also* Pet. App. 5a-6a); (ii) explicitly pleaded expectations of Congress at the time when the Telecommunications Act was passed, that the ILECs would aggressively compete with one another as CLECs (JA-20, ¶ 38); (iii) "public pledges" given by Petitioners, at the time of the 1996 Act, "that they would seek to advance the goals of competition by entering local telecommunications markets outside their region" (JA-47); and (iv) demonstrated

investment expectations of sophisticated CLEC investors, who invested "tens of billions of dollars" in the belief that competition as a CLEC was a potentially viable business model in the wake of the Telecommunications Act. JA-65. Nonetheless, based on a sweeping and unsupported assertion that the business of a CLEC is "entirely different" from that of an ILEC,[29] the District Court effectively rejected Plaintiff's clear allegations that competition as CLECs would have presented Petitioners with "an especially attractive business opportunity" in the absence of the alleged conspiracy. In doing so, the District Court plainly violated the established rule that simple and concise factual allegations made in a complaint must be treated as true.[30]

29. The District Court's broad assertion that the businesses of ILECs and CLECs are "entirely different" not only runs contrary to factors (ii) and (iii) in the text above, but is plainly incorrect, in light of facts such as that ILECs and CLECs compete with one another for the very same local telephone service customers, and that the physical infrastructures used to serve and maintain their respective customer bases are technologically very similar and interdependent. With regard to advertising and service (from the customer standpoint), as well as to technical equipment (from an operational standpoint) and manpower and expertise (from a personnel standpoint), it is starkly obvious that ILECs surrounding relatively small "islands" of service served by other ILECs would have numerous competitive advantages in competing as CLECs in those "islands." The District Court's contrary conclusion that for ILECs not to compete as CLECs is no different from a decision not "to enter some other line of business" (Pet. App. 57a) is simplistic and defies common business sense.

30. Petitioners and their amici rely on a recent supplement to the Hovenkamp antitrust treatise, in which Professor Hovenkamp expresses support for essentially the same conceptual error made by the District Court. Pet. Br. 14-15; SG Br. 21, 28. However, not only is there no indication that Professor Hovenkamp gave any consideration to factors such as those summarized above, but Professor Hovenkamp takes pains to caution the reader, at the outset of his discussion of the Second Circuit's opinion below, that he "was consulted by a defendant subsequent to the Second Circuit's decision." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 307d, at 150 n.1 (Supp. 2006).

3. Petitioners and their amici fail to construe the complaint liberally.

Petitioners and their amici try a different approach from that of the District Court, drawing hair-splitting distinctions between Plaintiffs' allegations and supposedly "different" allegations they assert Plaintiffs *could have* made to state a claim. The cornerstone of Petitioners' argument consists of a distinction between Plaintiff's most central allegation of fact – that competition by the ILECs as CLECs in their contiguous territories was "an especially attractive business opportunity" as to which adjoining ILECs would have "substantial competitive advantages" – and the supposedly "different" allegation that such nearby-entry opportunities were "more attractive than other business opportunities." Pet. Br. 35; SG Br. 28, 29. Even if a vanishingly microscopic distinction of this sort between "especially attractive opportunities" and "more attractive" opportunities made sense – and it does not – the near-invisible nature of any such distinction would be more than offset by the basic pleading principle that pleadings "are to be construed liberally in accordance with the mandate in Rule 8(f) and the general spirit of the federal rules." 5 Wright & Miller, §1215 at 195 (citing cases).[31] To allow such insubstantial "distinctions" to defeat a claim would run afoul of *Conley's* admonition that "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits," 355 U.S. at 48, while also conflicting with Rule 8(e)'s provision that "[n]o technical forms of pleading or motions are required."

---

31. Indeed, by effectively conceding that to allege that competition as a CLEC would have been "more attractive" *would have been adequate* to plead the "plus factor" of action against self-interest, Petitioners merely confirm the correctness of the Second Circuit's conclusion that a potentially persuasive "plus factor" *has been* alleged through simple and concise allegations that competition as a CLEC was an "especially attractive" opportunity.

4. Petitioners and their amici ignore simple and concise factual allegations as "conclusory."

Petitioners and their amici also argue that although "the complaint does assert that" Petitioners' non-competition in one another's territories "would be 'anomalous in the absence of an agreement . . . the complaint offers nothing but conclusory assertions in support of that statement." SG Br. 8. However, the pertinent allegations in the complaint clearly qualify under Rule 8(e)(1) as "simple" and "concise," including detailed, color maps of the Petitioners' configurations of contiguous territories (JA-37, 38), and specific factual assertions that competition by each of the Petitioners as CLECs in such contiguous territories would have been "an especially attractive business opportunity." JA-21, ¶ 40. The complaint alleges that competition by each of the Petitioners as CLECs in surrounded territories of the other Petitioners would have given the competing Petitioners "substantial competitive advantages," such that "[i]n the absence of an agreement not to compete, it is especially unlikely that there would have been no efforts by surrounding and dominant RBOCs to compete in such surrounded territories." JA-22, ¶ 41. To dismiss such simple and concise allegations wholesale as the Solicitor General does, on grounds that they should be entirely ignored as "conclusory" because they do not exhaustively explain *why* they are true – or because they do not rebut in advance all arguments one might conceive to the contrary – would be to open Pandora's box to a mind-numbingly detailed, evidentiary level of pleading in future antitrust conspiracy cases. The inevitable consequence would be a repeat of unfortunate past judicial experiences described in *Nagler*, involving "vast increases in verbiage" that "delayed the cause and exhausted the time of judges." 248 F.2d at 325.[32] Such a return to "technical forms" of pleading for conspiracy cases would be

32. To the extent that the Petitioners' arguments would require a plaintiff to anticipate and rebut affirmative defenses in his complaint, such arguments also are squarely contrary to *Gomez*. *See United States v. Northern Trust Co.*, 372 F.3d 886, 888 (7th Cir. 2004)("[C]omplaints need not anticipate and attempt to plead around defenses.").

undesirable, and would be incorrect under Rule 8(e)(1) as well as other well-established law.

5. Petitioners ignore the teaching of *Continental Ore*.

The defects in analysis of the complaint's allegations that are discussed in Parts 2 through 4 above relate to the first element of the conspiracy that Respondents allege, which is a conspiracy not to compete *with one another* as CLECs. Respondents also allege, however, that Petitioners engaged in parallel behavior calculated to prevent *other* CLECs from competing successfully. As Petitioners and their amici concede, Respondents allege at least two conventional "plus factors" with regard to this second element of the conspiracy specifically. SG Br. 27. Especially in light of those allegations, not only is the second element of the alleged conspiracy independently "plausible," but even if there were a "plus factors pleading requirement," it would be satisfied independently in connection with this second element.

Equally importantly, this Court held, in *Cont'l Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690, 699 (1962), that in analyzing an alleged antitrust conspiracy, a court must *not* "tightly compartmentaliz[e] the various factual components [of an alleged conspiracy] and wip[e] the slate clean after scrutiny of each." We have consistently cited this principle from *Continental Ore* in the briefing below. Nevertheless, completely ignoring *Continental Ore*, the District Court did exactly what *Continental Ore* forbids, compartmentalizing this second element of the alleged conspiracy separately, analyzing it first as though it were the core of the conspiracy claim, and "wiping the slate clean" of it before moving on to the primary element of the conspiracy, which is the alleged agreement not to compete *with one another* as CLECs. Pet. App. 48a-58a.

Petitioners and their amici do the same thing in their briefs to this Court, continuing completely to ignore *Continental Ore*. Pet. Br. 30-37; SG Br. 26-28. By doing so, they turn a blind eye to the mutually reinforcing aspects of the two prongs of the alleged conspiracy. Petitioners and their amici employ this

strategy in order to argue that the alleged success of Petitioners' efforts to keep other CLECs out provides an "alternative explanation" (under *Matsushita*) for the ILECs' non-competition with one another as CLECs – ignoring, meanwhile, Respondents' entirely plausible allegation that a false appearance of unattractiveness of CLEC competition was one of the Petitioners' motives for conspiring to keep other CLECs out in the first place. JA-26-27, ¶ 50.

Under *Continental Ore*, this "divide and conquer" approach to conspiracy allegations is legally impermissible. Instead, the first and primary element of the alleged conspiracy – the conspiracy not to compete *with one another* as CLECs – should be analyzed first, as was done by the Second Circuit. If that element satisfies the requirements of Rule 12(b)(6) – as it clearly must under any legal standard in light of Respondents' simple and concise allegations of "action against self-interest" – then there is no need or occasion separately to evaluate the secondary aspect of the alleged mutually-reinforcing conspiracy. The Second Circuit rightly recognized this, not separately analyzing the conspiracy's second element, after the first and primary element of the conspiracy had been found sufficient to state a claim. In that respect as well the Second Circuit's decision is legally correct, under *Continental Ore*.

CONCLUSION

For the foregoing reasons, the decision of the Second Circuit should be affirmed.

Dated: October 13, 2006

Respectfully submitted,

J. DOUGLAS RICHARDS
Counsel of Record
MICHAEL M. BUCHMAN
MILBERG WEISS BERSHAD
& SCHULMAN LLP
One Pennsylvania Plaza
New York, NY 10119-0165
(212) 594-5300

MARC A. TOPAZ
JOSEPH H. MELTZER
SCHIFFRIN & BARROWAY, LLP
280 King of Prussia Road
Radnor, PA 19087
(610) 667-7706

Attorneys for Respondents

102

23

No. 05-1126

Supreme Court, U.S.
FILED
NOV 9 - 2006
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BELL ATLANTIC CORPORATION, *ET AL.*,
Petitioners,

v.

WILLIAM TWOMBLY, *ET AL.*, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

STEPHEN M. SHAPIRO
KENNETH S. GELLER
RICHARD J. FAVRETTO
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000
Counsel for BellSouth Corporation

TIMOTHY BEYER
BROWNSTEIN HYATT & FARBER, P.C.
410 17th Street, 22nd Floor
Denver, Colorado 80202
(303) 223-1116
Counsel for Qwest Communications International Inc.

November 9, 2006

MICHAEL K. KELLOGG
Counsel of Record
MARK C. HANSEN
AARON M. PANNER
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
Counsel for AT&T Inc. (formerly SBC Communications Inc.)

RICHARD G. TARANTO
FARR & TARANTO
1220 19th Street, N.W., Suite 800
Washington, D.C. 20036
(202) 775-0184
Counsel for Verizon Communications Inc.

(additional counsel listed on inside cover)

LAURA J. COLEMAN
J. HENRY WALKER
MARC W.F. GALONSKY
ASHLEY WATSON
BELLSOUTH CORPORATION
1155 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 249-2720
Counsel for BellSouth Corporation

JOHN THORNE
PAUL J. LARKIN, JR.
DAVID E. WHEELER
ROBERT J. ZASTROW
VERIZON COMMUNICATIONS INC.
1515 North Courthouse Road
Arlington, Virginia 22201
(703) 351-3900

DAN K. WEBB
CHARLES B. MOLSTER III
WINSTON & STRAWN LLP
35 W. Wacker Drive
Chicago, Illinois 60601
(312) 558-5856
Counsel for Verizon Communications Inc. (successor-in-interest to Bell Atlantic Corporation)

CYNTHIA P. DELANEY
QWEST COMMUNICATIONS INTERNATIONAL INC.
1801 California Street
Denver, Colorado 80202
(303) 383-6790
Counsel for Qwest Communications International Inc.

JAVIER AGUILAR
WILLIAM M. SCHUR
AT&T SERVICES, INC.
175 E. Houston Street, 4th Floor
San Antonio, Texas 78205
(210) 351-3409
Counsel for AT&T Inc. (formerly SBC Communications Inc.)

CORPORATE DISCLOSURE STATEMENTS

Petitioners' Rule 29.6 Statements were set forth at page iii of their opening brief, and there are no amendments to those Statements.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENTS i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT:

I. RULE 8 AND THE DECISIONS OF THIS COURT REQUIRE PLEADING OF FACTS SUFFICIENT TO STATE A CLAIM FOR RELIEF 2

II. ABSENT OTHER FACTS SUGGESTIVE OF AGREEMENT, ALLEGATIONS OF PARALLEL CONDUCT DO NOT SUPPORT A CLAIM OF CONSPIRACY UNLESS THEY "TEND TO EXCLUDE" THE POSSIBILITY THAT DEFENDANTS ACTED UNILATERALLY 8

III. ALLEGATIONS OF PARALLEL *NON*-ENTRY THAT PRESERVES A PROFITABLE STATUS QUO DO NOT SUPPORT AN INFERENCE OF CONSPIRACY 16

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Anza v. Ideal Steel Supply Corp., 126 S. Ct. 1991 (2006) 4

Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983) 2, 4

Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) 9

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993) 10

Conley v. Gibson, 355 U.S. 41 (1957) 2, 3, 4, 5, 7

Cooper v. Pickett, 137 F.3d 616 (9th Cir. 1997) 19

DM Research, Inc. v. College of Am. Pathologists, 170 F.3d 53 (1st Cir. 1999) 8, 11, 18

Dura Pharms., Inc. v. Broudo, 544 U.S. 336 (2005) 4, 9

Hishon v. King & Spalding, 467 U.S. 69 (1984) 5

Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738 (1976) 5, 15

J&J Furniture & Sleep Shop v. Sealy Southeast, 1981 Trade Cas. ¶ 64,166 (S.D. Tex.) 12

Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993) 5, 7

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 13, 15

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 6

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982) 16

National Organization for Women, Inc. v. Scheidler, 510 U.S. 249 (1994) 5

Papasan v. Allain, 478 U.S. 265 (1986) 2, 4

Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962) 15

Radovich v. NFL, 352 U.S. 445 (1957) 15

Scheuer v. Rhodes, 416 U.S. 232 (1974) 10

Serfecz v. Jewel Food Stores, 67 F.3d 591 (7th Cir. 1995) 11

Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002) 5, 6, 7, 11

United States v. Employing Plasterers' Ass'n of Chicago, 347 U.S. 186 (1954) 5

Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) 4, 18

Wilson v. Schnettler, 365 U.S. 381 (1961) 4

STATUTES AND RULES

Civil Rights Act of 1964, Pub. L. No. 88-352, Tit. VII, 78 Stat. 241, 253 5

Sherman Act, 15 U.S.C. §§ 1 *et seq.*:

§ 1, 15 U.S.C. § 1 ..... 1, 8, 11, 13

§ 2, 15 U.S.C. § 2 17

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 8

15 U.S.C. § 1312(a) 9

Fed. R. Civ. P.:

Rule 8 ..... 2, 5, 7, 8

Rule 8(a) 1

Rule 8(a)(2) 8

Rule 12(b)(6) 1, 4

LEGISLATIVE MATERIALS

Antitrust Enforcement Agencies – The Antitrust Division of the Department of Justice and the Bureau of Competition of the Federal Trade Commission: Hearing Before the Task Force on Antitrust of the House Comm. on the Judiciary, 108th Cong., 1st Sess. (July 24, 2003) 17, 18

H.R. Rep. No. 94-1343 (1976) 9

OTHER MATERIALS

6 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* (2d ed. 2003) 10, 12

William Breit & Kenneth G. Elzinga, *Antitrust Penalty Reform* (1986) 14

Brief for the United States and the Federal Trade Commission as *Amici Curiae*, *Empagran, S.A. v. F. Hoffmann-Laroche, Ltd.*, No. 01-7115 (D.C. Cir. filed Feb. 16, 2005) 16

Charles E. Clark, *Handbook of the Law of Code Pleading* (2d ed. 1947) 7

Complaint, *Pease v. Jasper Wyman & Son*, No. CV-00-015 (Me. Super. Ct. filed Feb. 28, 2000) 16

Complaint, *Strobl v. New York Mercantile Exchange*, No. 79 Civ. 1834 (S.D.N.Y. filed Apr. 6, 1979) 15, 16

Franklin M. Fisher, *Economic Analysis and Antitrust Damages*, 29 World Competition 383 (2006) 15

Herbert Hovenkamp, *The Antitrust Enterprise* (2005) 14

Fleming James, Jr., *et al.*, *Civil Procedure* (5th ed. 2001) 5, 8-9

Joint Appendix, *Dura Pharms., Inc. v. Broudo*, No. 03-932 (U.S. filed Sept. 13, 2004) 9

Joint Appendix, *Swierkiewicz v. Sorema N.A.*, No. 00-1853 (U.S. filed Nov. 16, 2001) 6

Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. Rev. 982 (2003) 13

Richard Posner, *Antitrust Law* (2d ed. 2001) 14

Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 Geo. L.J. 1001 (1986) 14

Transcript of Record, *Conley v. Gibson*, 355 U.S. 41 (1957) (No. 7) 4

5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* (3d ed. 2004) 6, 7

INTRODUCTION

Respondents concede that a bald assertion of "conspiracy" cannot suffice on its own to state a claim under Section 1 of the Sherman Act: the bare invocation of the statutory standard fails to "show[] that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). Instead, in a complaint such as this one, which is based solely on "observations of public conduct and market circumstances," Resp. Br. 21, the pleaded facts must support an inference – as respondents put it, be "genuinely suggestive," *id.* – of conspiracy. That standard, whatever form of words is used to formulate it, requires a court to evaluate the pleaded facts in light of the substantive legal standards governing the claim.

The allegations in the complaint in this case, which respondents all but ignore, fail to support any reasonable inference that petitioners conspired. The allegations here lie at the opposite end of the spectrum from conduct that "*would* be strongly suggestive of conspiracy," such as simultaneously undertaken "complex and historically unprecedented changes in pricing." *Id.* at 37. The complaint alleges that petitioners *failed* to undertake a "historically unprecedented change[]" in their local telephone businesses by suddenly competing out-of-region as CLECs and failed to comply with burdensome sharing demands intended to assist competitors. Substantive antitrust law teaches that such allegations cannot support an inference that petitioners conspired, because these facts do not even "tend to exclude" the obvious *unilateral* explanation for the conduct, *i.e.*, pursuit of self-interest independently determined. To permit such a case to proceed would penalize efficient conduct, imposing unwarranted burdens on innocent defendants, without any deterrence benefit.

It is left to amici to argue that respondents did not have to plead *any* facts in support of the critical agreement element of their claim under Section 1 – that "general or conclusory allegations suffice." Lerach Br. 11. That extreme position would effectively nullify Rule 12(b)(6), as virtually no complaint could ever be dismissed for failure to state a claim, and

is contrary to the plain terms of Rule 8 and *Conley*, which require that a complaint disclose "what the plaintiff's claim is *and the grounds upon which it rests*." 355 U.S. at 47 (emphasis added). It is inconsistent with *Papasan*, which holds that a court need not accept a legal conclusion as fact, and with repeated decisions of this Court requiring dismissals of inadequate complaints. It would overrule the governing law of every circuit, *see* Pet. Br. 17 & n.1; U.S. Br. 14 n.14, which requires district courts to distinguish between well-pleaded factual allegations on the one hand and conclusory assertions and unwarranted inferences on the other in evaluating the sufficiency of a complaint. And it contradicts *Associated General Contractors*, which holds, specifically in the context of a complex antitrust case, that it is *improper* for a court to assume the existence of facts "not alleged."

Applying established, not "heightened," pleading standards and this Court's antitrust principles, the district court properly dismissed the complaint. This Court should reinstate that judgment.

ARGUMENT

I. RULE 8 AND THE DECISIONS OF THIS COURT REQUIRE PLEADING OF FACTS SUFFICIENT TO STATE A CLAIM FOR RELIEF

A. Respondents concede that, in evaluating the sufficiency of a complaint, it is the factual allegations, not the legal conclusions or labels that a plaintiff may attach to them, that must be evaluated to determine whether the complaint states a claim. Nowhere in their brief do respondents argue that the bare allegation that defendants "agreed" satisfies the standards of Rule 8. Indeed, respondents acknowledge that "[m]any cases involving asserted 'parallel conduct'" – inevitably accompanied by the required assertion that defendants agreed – "are likely to fail" under the standard that respondents defend. Resp. Br. 37.

Respondents thus do not subscribe to the arguments of amici that the Federal Rules require only "enough factual

detail for the defendants to understand the nature of the case against them, and for the Court to *hypothesize* that *some* set of facts *might* be proved to warrant relief." Lerach Br. 9 (first and third emphases added). This standard would mean that no claim of concerted action could ever be dismissed, because it is always possible to *hypothesize* that ostensibly unilateral action is the result of an agreement. And amici are wrong in arguing that *Conley* supports their standard.

When this Court said in *Conley* that a complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim," 355 U.S. at 45-46, it was addressing the *legal* sufficiency of the facts *alleged*, without regard to other, possibly extenuating facts. *See* Pet. Br. 28-29. Immediately after the quoted language, the opinion says that

> the complaint alleged, in part, that petitioners were discharged wrongfully by the Railroad and that the Union, acting according to plan, refused to protect their jobs as it did those of white employees or to help them with their grievances all because they were Negroes. *If these allegations are proven* there has been a manifest breach of the Union's statutory duty[.]

355 U.S. at 46 (emphasis added). Similarly, when the Court considered the union's separate argument that the complaint "failed to set forth specific facts to support its general allegations of discrimination," the Court rejected it without suggesting that wholly conclusory allegations were adequate. Rather, it held that the facts alleged were plainly sufficient to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Id.* at 47. The complaint in *Conley* covers 15 single-spaced pages in this Court's transcript;[1] given the detailed factual allegations of discrimi-

---

[1] Among other claims, the complaint detailed the abolition of 45 jobs held by the plaintiffs (who had been segregated into a separate Union Local) and the creation of corresponding jobs that were filled first by white employees with no experience. In the words of the complaint, "the afore-

natory conduct, summarized earlier in its opinion, *id.* at 42-43, the Court properly brushed aside the union's "lack of specificity" argument.

Amici's proposed standard is contrary to the Federal Rules, the decisions of this Court, and the unanimous views of the courts of appeals. *See* Pet. Br. 16-23. The very function of a Rule 12(b)(6) motion is to weed out complaints that allege only lawful conduct: district courts must dismiss complaints that fail "to state a claim upon which relief can be granted." That inquiry requires a comparison of the facts alleged (not hypothesized facts) to the legal standard governing some cognizable claim. As we demonstrated in our opening brief, time and again this Court has affirmed dismissal of complaints that fail to allege facts material to the plaintiff's claim, despite the assertion of the ultimate legal conclusion. *See, e.g.*, *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006); *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336 (2005); *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *Papasan v. Allain*, 478 U.S. 265 (1986); *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983); *Wilson v. Schnettler*, 365 U.S. 381 (1961). Amici's argument that dismissal is improper unless a complaint itself recites facts that affirmatively *foreclose* any claim for relief is

---

mentioned jobs, which were all freight handlers jobs, were not abolished, for persons were immediately hired to perform said jobs, doing the same type and class of work that plaintiffs . . . had done prior to their discharge. . . . [M]any persons of the white race were hired on these jobs and subsequently some of those who had been previously fired, who are Negroes . . . [,] were rehired, with no seniority, and junior to all the white persons who had been previously hired but who had never before performed this work." Tr. 12, No. 7. By contrast, "none of the white employees represented by the [union] have been so discharged or displaced." Tr. 12-13. The complaint further alleged that "said acts constituted a planned course of conduct designed to discriminate against them because of their race or color" and that the union refused "to give to plaintiffs protection or any protection from said discrimination equal to that afforded to members of the white race . . . represented by the [union]." Tr. 13.

grounded entirely on a phrase from *Conley*, wrenched out of its context, and would have required a result different from that reached in the cited cases.[2]

B. Respondents and their amici repeatedly claim that petitioners, the United States, the American Bar Association, and other amici seek in this case to erect "heightened pleading standards" for antitrust claims. Their insistence on this point substitutes epithet for argument. We have made clear from the start that our contention is that the complaint fails under ordinary Rule 8 standards.

Accordingly, neither *Swierkiewicz* nor *Leatherman* supports respondents, because neither case dispenses with the ordinary requirement that a complaint must contain factual allegations "on every material point necessary to sustain a

---

[2] When this Court has drawn on *Conley*'s language, it has never done so to hold that a district court must accept a conclusory allegation comparable to the bare assertion of "conspiracy" at issue here. Some of the cases cited by amici have nothing to do with the failure to plead material facts. For example, in *Hishon v. King & Spalding*, 467 U.S. 69 (1984), the issue was whether the employment-discrimination bar of Title VII reaches selection of partners for a partnership; the Court held that it does and said that the plaintiff was thus entitled to "her day in court *to prove her allegations*." *Id.* at 79 (emphasis added). Other cases involved factual allegations of injury or effect on interstate commerce that comfortably supplied the required basis to proceed. *See, e.g., National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 256 (1994) (allegation of injury sufficient to establish standing where plaintiffs alleged that defendants had "conspired to use force to induce clinic staff and patients to stop working and obtain medical services elsewhere" and had "threatened [the plaintiff's] clinic administrator with reprisals if she refused to quit her job at the clinic"); *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 743-47 (1976) (effort to monopolize market for provision of health services had effect on interstate commerce); Pet. Br. 18 (discussing *United States v. Employing Plasterers' Ass'n of Chicago*, 347 U.S. 186 (1954)). *See also* James, *Civil Procedure* § 3.9, at 196-97 ("The nearer the allegation is to the heart of contentions important to the case, the stronger the insistence on further detail. . . . The more readily the fact alleged corresponds to common experience, the less detail is likely to be required[.]").

recovery." 5 Wright & Miller, *Federal Practice and Procedure* § 1216, at 220-27. In *Swierkiewicz*, the complaint both identified a specific employment action and described the nature of the alleged discrimination: demotion and other adverse employment action on account of the employee's age and national origin. If the adverse action was in fact taken with discriminatory intent (as alleged), Mr. Swierkiewicz had a claim. The complaint specifically identified the transactions at issue, with names, dates, and places, making it straightforward for the defendant to investigate and defend against the claim. *See* 534 U.S. at 514 ("His complaint detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination. These allegations give respondent fair notice of what petitioner's claims are and the grounds upon which they rest.") (citation omitted). The complaint here includes no such facts regarding the circumstances of any supposed agreement.

The Second Circuit in *Swierkiewicz* had upheld dismissal based exclusively on the mistaken proposition that a discrimination plaintiff is *required* to establish a circumstantial (that is, indirect) case under *McDonnell Douglas*. This Court rejected that requirement, pointing to the "detailed" *direct* allegations of discrimination in the complaint.[3] The Court did not "relieve[] the plaintiff of the requirement to allege a factual predicate sufficient to provide notice and to

[3] Thus, the plaintiff alleged that he was "a native of Hungary" and "53 years old," that the chief executive of his employer was a "French national," that the plaintiff performed his job in an "exemplary manner," that, despite his "stellar performance," he was "demoted" and his responsibilities transferred to a "French national" who was "32 years old at the time," that the demotion was "on account of his national origin . . . and his age," that he was discriminated against in various other ways in the allocation of duties within the company, that he was fired without "valid basis," and that "age and national origin were motivating factors" in his firing. *Swierkiewicz* JA 5a-9a, No. 00-1853. This is nothing like the bare assertion of conspiracy at issue here.

demonstrate a reasonable basis for inferring that the defendant may have engaged in wrongful conduct." U.S. Br. 16. Notably, the United States, having supported the plaintiff in *Swierkiewicz*, agrees with petitioners and the district court that plaintiffs in this case did not meet the Rule 8 standard.

In *Leatherman*, the Court noted that a district court is required to accept "*factual* allegations," 507 U.S. at 164 (emphasis added), but did not hold that a plaintiff is relieved of the requirement of pleading the factual "grounds" upon which a complaint rests, *Conley*, 355 U.S. at 46. Respondents argue that *Leatherman* rejects the proposition that an evaluation of the sufficiency of a complaint's factual allegations depends on the law governing the claim. Resp. Br. 24. In fact, *Leatherman* does not even discuss the sufficiency of the factual allegations of the complaint under Rule 8; the Court remanded, without reaching that question, because it was "quite evident" that the Fifth Circuit had applied a "heightened pleading standard" that required the plaintiff to plead around "the defense of immunity." 507 U.S. at 167. *See also* U.S. Br. 12 n.4. The Court in *Leatherman* thus did not alter the well-established principle that "the appropriate level of generality for a pleading depends on the particular issue in question or the substantive context of the case." 5 Wright & Miller § 1218, at 273; *see also* Charles E. Clark, *Handbook of the Law of Code Pleading* 232 (2d ed. 1947) ("If we take as our test the requirement of fair notice of each material fact of the pleader's cause, it must follow that our solution should vary with the case presented. . . . The particularity of allegation should vary with the question at issue.") (footnote omitted); *see also id.* at 241 ("[t]he above analysis . . . now finds its most complete exemplification in the Federal Rules").

In this case, as the United States correctly emphasizes, "agreement is the critical factor distinguishing innocuous parallel conduct from a Section 1 violation." U.S. Br. 8. Nothing is easier than claiming that parallel conduct was the result of an agreement, and for that reason courts do and must

"insist on more than mere conclusory allegations of that element." *Id.*; *see DM Research*, 170 F.3d at 56 (allegation of "'conspiracy'" or "'agreement'" insufficient absent "more specific allegation[s]"). The allegation of agreement here is an extreme example of a conclusory assertion that is properly disregarded. The Second Circuit acknowledged that the complaint alleges no "specific instances of conspiratorial conduct or communications," Pet. App. 31a, and that is an understatement: the *only* fact that the complaint alleges with regard to the supposed agreement is that it began "at least as early as February 6, 1996," JA 30 (Am. Compl. ¶ 64), the date the Telecommunications Act of 1996 became law. Without any facts, such an assertion of agreement is nothing more than a naked conclusion.

II. ABSENT OTHER FACTS SUGGESTIVE OF AGREEMENT, ALLEGATIONS OF PARALLEL CONDUCT DO NOT SUPPORT A CLAIM OF CONSPIRACY UNLESS THEY "TEND TO EXCLUDE" THE POSSIBILITY THAT DEFENDANTS ACTED UNILATERALLY

Respondents defend the Second Circuit's standard on the basis that allegations of parallel conduct state a claim under Section 1 so long as they admit of a "reasonable *possibility*" that defendants conspired, Resp. Br. 18, 20, 29, *i.e.*, unless the hypothesis that such conduct is the result of a conspiracy falls below a "threshold of implausibility," *id.* at 22. In an attempt to reach their own complaint, respondents then insist that plaintiffs need only posit a "'plausible' motive" for plaintiffs to agree. *Id.* at 37. That standard conflicts with the Federal Rules and with substantive antitrust standards.

A. The fundamental requirement of Rule 8 is that a complaint set forth a "short and plain statement of the claim showing that the pleader *is* entitled to relief." Fed. R. Civ. P. 8(a)(2) (emphasis added). It is thus plainly *in*sufficient to allege that there is merely a reasonable possibility that the pleader *may be* entitled to relief. *See, e.g.*, James, *Civil*

Procedure § 3.6, at 189 (Federal Rules do not permit complaints based on claims that there is "reason to believe that, upon evidence which may be disclosed by discovery, the pleader may be entitled to relief").[4]

That principle is embodied in the Court's holding in *Dura* that a complaint fails to state a claim unless the allegations support a "'reasonably founded hope'" that discovery will reveal evidence in support of the claim. 544 U.S. at 347 (quoting *Blue Chip Stamps*, 421 U.S. at 741). The issue faced by the Court in *Dura* was closely analogous to the issue here: the complaint alleged that the plaintiffs had purchased stock at an inflated price and were "damaged thereby." *Dura* JA 59a-60a, No. 03-932. Though nothing in the complaint was inconsistent with the *hypothesis* that the plaintiffs had suffered an economic loss proximately caused by the defendants' alleged fraud, neither did the complaint plead facts sufficient to support that hypothesis. The Court unanimously ruled that the complaint was inadequate because the plaintiffs' failure to allege the essential facts would have required the Court to *supply* (or hypothesize) the missing allegations.

Here, too, the district court correctly held that it could not reasonably draw the necessary inference from the allegations in the complaint. Respondents expressly pleaded their conspiracy claim as an inference to be drawn from "observations of public conduct and market circumstances." Resp. Br. 21; *see* JA 27 (Am. Compl. ¶ 51) (expressly identifying the conspiracy allegation as one made "upon information and belief"). Specifically, respondents sought to rely on an inference, to be drawn in light of market circumstances, that

---

[4] Congress has given the Department of Justice ("DOJ"), but not private litigants, authority to investigate upon mere "reason to believe" that a person has information "relevant to a civil antitrust investigation." 15 U.S.C. § 1312(a). The pertinent committee report noted that, "because of their speculative approach and unduly prejudicial impact, investigations by means of 'skel[e]ton' complaints have been universally condemned as a *perversion of the Federal Rules of Civil Procedure*." H.R. Rep. No. 94-1343, at 6 (1976) (emphasis added).

the alleged parallel conduct was the result of an agreement. Because the facts alleged do not support such an inference, the complaint was properly dismissed.

Respondents claim that their "reasonable possibility" standard finds support in this Court's statement in *Scheuer v. Rhodes*, 416 U.S. 232 (1974), that a complaint may proceed even if "it . . . appear[s] on the face of the pleadings that a recovery is very remote and unlikely." *Id.* at 237. The argument confuses the principle that pleaded facts must be accepted as true even if they appear unlikely, which *Scheuer* confirms, with the requirement that plaintiffs plead sufficient facts to show they are entitled to relief, which *Scheuer* leaves unaltered. In the present case, the complaint is deficient not because it alleges improbable facts, but because its factual allegations, taken as true and drawing all reasonable inferences in favor of plaintiffs, fail to support the conclusion of conspiracy and thus fail to state a claim for relief. *See* Pet. Br. 23-25. As the United States puts it, when a plaintiff seeks to rely on inferential allegations of conspiracy, the facts alleged must provide "a reasonably grounded expectation that discovery will reveal evidence of an illegal agreement." U.S. Br. 23.

B. Whether particular allegations of parallel conduct support a reasonable inference of conspiracy is a determination that must be made with reference to substantive antitrust standards. At the threshold, of course, the allegation that defendants acted in parallel (even if they did so "consciously") is not by itself enough to state a claim; such parallel conduct is "not in itself unlawful." *Brooke Group*, 509 U.S. at 227. Furthermore, most parallel conduct, in the absence of additional circumstances, does not suggest that defendants reached any agreement: parallel conduct is ubiquitous, as similarly situated businesses react to comparable incentives. *See* Economists' Br. 7-9. "[T]here is no basis for inferring any kind of agreement from . . . mere parallel behavior." 6 Areeda & Hovenkamp, *Antitrust Law* ¶ 1410a, at 60; U.S. Br. 20-21. Indeed, respondents seem to recognize this funda-

mental proposition, conceding that "[m]any cases involving asserted 'parallel conduct' are likely to fail." Resp. Br. 37.

Respondents' argument that a "plausible motive" to conspire supplies sufficient basis for inferring that an agreement existed is incorrect for the same reason. Just as parallelism does not suggest that there is an agreement, neither does the nearly ubiquitous fact that defendants might have secured some potential benefit from agreeing. The "mere existence of mutual economic advantage" "supplies *no basis* for inferring a conspiracy" because it "does not tend to exclude the possibility of independent, legitimate action." *Serfecz*, 67 F.3d at 600-01; *see also, e.g., DM Research*, 170 F.3d at 58 (dismissing claim against standards-setting organization despite existence of motive to conspire). It is almost always possible to hypothesize a potential advantage from coordination with competitors. *See* Pet. Br. 31-32 & n.2; U.S. Br. 27 ("[A]n abstract opportunity and some incentive to conspire almost always exists among competitors, so alleging such a truism does nothing to create a reasonably grounded expectation that discovery will reveal that petitioners agreed to do what is conceded to be in their self-interest in any event."). The existence of such potential advantage does not suffice to distinguish allegations of lawful conduct from allegations of unlawful conduct.

C. Respondents argue that to require that allegations of parallel conduct "tend to exclude" the possibility of unilateral conduct is the same error that led this Court to reverse in *Swierkiewicz*. Resp. Br. 26-27. That is, respondents argue, because a Section 1 plaintiff need not *prove* an "inferential case" "if direct evidence is available instead," *id.*, it is wrong to require that a plaintiff's factual allegations support an inference of conspiracy at the pleading stage. But this argument avoids the issue. A plaintiff *can* plead facts directly identifying an agreement, but respondents simply have not done so. *See* Pet. Br. 6-7. Respondents deliberately chose to plead their conspiracy claim on the basis of "observations of public conduct and market circumstances." Resp. Br. 21.

Once they did so, the facts alleged had to support the claim of agreement under the "tend to exclude" standard that governs such inferences.

It is easy to point to circumstances that would "tend to exclude" the possibility of unilateral action. Respondents propose one such example – "complex and historically unprecedented changes in pricing." *Id.* at 37. In the absence of unusual facts, one would not expect several competitors to adopt a "complex and historically unprecedented change[] in pricing" simultaneously and spontaneously. *See* 6 Areeda & Hovenkamp ¶ 1425a, at 167 (noting that some "parallel behavior . . . would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding"). The United States proposes another such circumstance – identical actions taken directly after a "particular jointly attended meeting[]." U.S. Br. 23; *see* 6 Areeda & Hovenkamp ¶ 1425e5, at 182-83 (discussing *J&J Furniture & Sleep Shop v. Sealy Southeast*, 1981 Trade Cas. ¶ 64,166 (S.D. Tex.)). One can imagine other examples.

The complaint at issue here, however, involves no such allegations. Far from alleging a complex and historically unprecedented *change* in behavior, the complaint alleges that petitioners failed "meaningful[ly]" to enter new markets, maintaining the status quo. JA 21 (Am. Compl. ¶ 39); *see* U.S. Br. 21 ("Parallel *inaction* is even less suggestive of illicit agreement."). Respondents do not even argue that allegations of inadequacies in petitioners' network-sharing are sufficient on their own to support an inference of conspiracy. *See also* Pet. Br. 32 n.3. And there are no allegations of any specific meetings or other communications, followed by any particular marketplace actions. *See id.* at 37 n.6.

The proffered basis for the claim of agreement here is quite different: the complaint alleges that petitioners' failure to compete meaningfully as out-of-region CLECs "would be anomalous in the absence of an agreement." JA 21 (Am.

Compl. ¶ 40). The reference to *Matsushita* and its progeny (which require facts that "tend to exclude the possibility" that the alleged conspirators acted independently) is unmistakable. The complaint itself thus recognizes the principle that allegations of parallel conduct do not support a claim of conspiracy *unless* the behavior would be contrary to the defendants' legitimate economic self-interest (would be "anomalous") absent conspiracy. *See* Pet. Br. 24-25.[5] But, having invoked the relevant legal standard, the complaint fails to allege the types of circumstances that would satisfy it. *See infra* pp. 18-20.

D. Respondents and their amici argue that Section 1 plaintiffs should be relieved of the ordinary pleading burdens because there is little risk of nuisance antitrust litigation and because private civil litigation initiated in the absence of supporting factual allegations provides important cartel deterrence. Both aspects of this argument are incorrect.

1. The costs and burdens imposed by meritless litigation – particularly class action litigation, where plaintiffs have no risk of counterclaims or harm to business and where discovery burdens are borne almost exclusively by defendants – are too well documented to require or to allow great elaboration here. Respondents' claim that antitrust litigation is somehow

---

[5] *Matsushita* holds that "*antitrust law* limits the range of permissible inferences from ambiguous evidence in a § 1 case." 475 U.S. at 588 (emphasis added). In the words of Professor Miller, *Matsushita* "was basing its decision on *underlying substantive antitrust law* rather than employing a new summary judgment standard." Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. Rev. 982, 1030 (2003) (emphasis added). The same substantive antitrust law properly informs a district court's evaluation of the reasonableness of inferences from allegations of parallel conduct. *See* U.S. Br. 21 (explaining, in light of governing antitrust principles, that "factual allegations indicating only that defendants engaged in parallel conduct" joined with "an unadorned allegation of the existence of a 'conspiracy' or an 'agreement'" fail to state a claim).

an *exception* to this rule, *see* Resp. Br. 12-17, is nonsense.[6] The United States, the states' attorneys general, and the American Bar Association have urged this Court to reverse the Second Circuit's decision precisely because, by failing to require adequate factual allegations in support of an antitrust conspiracy claim, the court's standard "perversely risks turning a sign of healthy competition [parallel conduct] into a green light for strike suits and *in terrorem* settlement demands." U.S. Br. 25; *see* State AGs' Br. 1 ("the standard adopted by the court below will encourage plaintiffs to file first and investigate later"); ABA Br. 11 ("A lack of adequate threshold requirements . . . not only may waste substantial resources but may create unfortunate incentives for parties to bring speculative claims with the expectation of achieving a settlement prior to the summary judgment stage.").

The claim of amicus AAI that "[f]ormal models do not predict" the filing or settlement of unmeritorious claims is simply wrong. AAI Br. 4.[7] Those models confirm what experience demonstrates: that, if the bar is lowered to barebones antitrust pleadings, the incentive to file unmeritorious litigation will ensure a steady stream of frivolous suits. If a plaintiff can secure certification of a class – even if the

---

[6] *See, e.g.*, Herbert Hovenkamp, *The Antitrust Enterprise* 59 (2005) ("many marginal and even frivolous antitrust cases are filed every year, and antitrust litigation is often used as a bargaining chip"); Richard Posner, *Antitrust Law* 275 (2d ed. 2001) ("class action[s] permit[] class-action lawyers to make plausible though not necessarily valid arguments for damages so immense that even though the probability that a court would award anywhere near the amount sought is very slight, the expected cost of the suit . . . may be sufficient to induce a settlement").

[7] *See, e.g.*, William Breit & Kenneth G. Elzinga, *Antitrust Penalty Reform* 39 (1986) (noting that plaintiffs are spurred to file frivolous suits "in the hope that defendants will pay some money rather than engage in the expense of litigation (and incur the chance of judicial error)"); Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 Geo. L.J. 1001, 1029 (1986) (noting that "extortion tactics are more credible when the adversary's costs can be raised *relative* to the increase in the extortionist's own costs").

underlying case is without merit – the pressure to settle (like the potential fee award to the class action lawyer) becomes enormous. Few firms can accept even a very small risk of nationwide liability and treble damages.[8]

2. Respondents and their amici also make the flip-side argument that vacuous antitrust complaints should be allowed to proceed because conspiracies are difficult to detect and the deterrence value of private suits is great. *See* Resp. Br. 22-23; AAI Br. 7-11.[9] The argument is not valid generally or in the circumstances of this case.

First, requiring factual allegations to support a claim of conspiracy will not discourage non-speculative litigation. Where "public conduct and market circumstances" support an inference of conspiracy, those facts are available to a plaintiff upon reasonable investigation. The two meritorious cases that AAI claims would have been "prevented" by application of ordinary pleading standards, AAI Br. 13-15, bear this out. In both, the plaintiff included concrete factual allegations that plainly suggested agreement.[10] Encouraging

---

[8] *See* Franklin M. Fisher, *Economic Analysis and Antitrust Damages*, 29 World Competition 383, 392 (2006) ("Because of treble damages, the defendants' exposure if a large class is certified can become enormous. Hence there is great pressure on them to settle, and this is what usually happens. . . . This phenomenon . . . encourages the bringing of unmeritorious cases. It has, I believe, led to a sort of legal piracy.").

[9] No decision of this Court supports the claim that a lower pleading standard applies to claims of conspiracy. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962), a pre-*Matsushita* summary judgment case, did not address the existence of an agreement; it addressed the question whether the defendant network could cancel an affiliation agreement with a local station pursuant to a conspiracy (a matter that the Court held turned on "motive and intent," *id.* at 473, not the existence of agreement, which was essentially uncontested). And both *Hospital Building* and *Radovich v. NFL*, 352 U.S. 445 (1957), involved the sufficiency of facts to show an effect on interstate commerce. *See supra* note 2.

[10] In *Strobl v. New York Mercantile Exchange*, No. 79 Civ. 1834 (S.D.N.Y. filed Apr. 6, 1979), the complaint alleged a conspiracy to corner the market in two specific potato future contracts and to manipulate

random litigation would not deter unlawful conduct, but would significantly penalize lawful conduct. *See* Economists' Br. 11-18.

Second, antitrust enforcement authorities confirm that speculative complaints do not "serve th[e] end" of deterring cartel behavior. U.S. Br. 1. According to the Government, "the vast majority of private suits against cartels[ ] are follow-on actions triggered by the government's exposure of a cartel." Brief for the United States and the Federal Trade Commission as *Amici Curiae* at 23, *Empagran, S.A. v. F. Hoffmann-Laroche, Ltd.*, No. 01-7115 (D.C. Cir. filed Feb. 16, 2005). Assuming that such follow-on private damages suits help to deter unlawful conduct, such suits – which piggy-back on government investigations and their exposure of pertinent facts – are not implicated here.

III. ALLEGATIONS OF PARALLEL *NON*-ENTRY THAT PRESERVES A PROFITABLE STATUS QUO DO NOT SUPPORT AN INFERENCE OF CONSPIRACY

Even under respondents' proposed standard, a claim of conspiracy must be dismissed if the allegation of conspiracy is "'unlikely speculation[ ]'" rather than some degree of "reasonable" inference from the alleged facts. Resp. Br. 21, 29. As the United States and the attorneys general of 16 states

---

the market price of potatoes. The defendants' parallel *departures* from common and accepted business practice were the basis for the highly detailed complaint. *See* Compl. ¶¶ 52, 53; *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 367 & n.39 (1982) (describing dramatic departure from usual market behavior as a result of concerted manipulation). In *Pease v. Jasper Wyman & Son*, No. CV-00-015 (Me. Super. Ct. filed Feb. 28, 2000), the complaint alleged that defendant competitors *simultaneously* announced identical bid prices for the plaintiffs' wild blueberries and met annually at a specific location to agree on the bids. *See* Compl. ¶¶ 29 (defendants "set the same price at the same time"), 32(d) (annual price-fixing meetings "occurred at the Holiday Inn in Ellsworth, Maine, among other places").

have concluded, the allegations in this complaint do not support any such reasonable inference.

A. Respondents hardly defend the claim that the alleged inadequacies in petitioners' assistance to new entrants support an inference of conspiracy. In fact, rather than defend such allegations as sufficient, respondents argue that the allegations pass muster as a facet of the supposed "primary" conspiracy not to compete.[11] Respondents have thus implicitly conceded that allegations of parallel failure to assist CLECs do *not* suffice to state a claim as a free-standing conspiracy.

That concession illustrates petitioners' point: the inference of conspiracy from such conduct is unreasonable *not* because there is no conceivable benefit from such an agreement but because the conduct is so plainly consistent with unilateral self-interest in the *absence* of conspiracy. Every business has an interest in not making efforts to assist "competition in their respective . . . markets," JA 23 (Am. Compl. ¶ 47); indeed, one of the respondents brought suit against AT&T's predecessor *under Section 2* for *unilaterally* failing to facilitate local entry to preserve alleged market power, *see* Pet. Br. 5; *see also* Resp. Br. 41-42 (noting that counsel represented Section 2 plaintiffs against Verizon, SBC, and BellSouth).[12]

---

[11] Respondents thus argue that the motive for "keep[ing] other CLECs out" was to create "a false appearance of unattractiveness of CLEC competition." Resp. Br. 49. But, taking as true the complaint's allegations that petitioners failed to facilitate CLEC entry, there was no "false appearance of unattractiveness"; CLEC competition *was* unattractive, as the complaint itself alleges. JA 11, 23-24 (Am. Compl. ¶¶ 4, 47).

[12] Respondents represent that counsel decided to bring this suit after reading a congressional letter asking the DOJ to investigate the possibility of an unlawful conspiracy. Resp. Br. 42. That letter does not contain *any* factual detail concerning an alleged conspiracy. *See* JA 46-49. Moreover, the Assistant Attorney General for Antitrust testified before Congress that he was "familiar" with the conduct that is cited in the letter (and the complaint) but did not believe it constituted evidence of an antitrust violation. *Antitrust Enforcement Agencies' The Antitrust Division of the Department of Justice and the Bureau of Competition of the Federal Trade Commission: Hearing Before the Task Force on Antitrust of the*

The unilateral motive for the alleged parallel conduct appears on the face of the complaint, which therefore cannot support the claim of agreement. *See* U.S. Br. 26-27.

B. Respondents ultimately rely on the allegation that entry into "surrounded territories" was "an especially attractive business opportunity" that petitioners did not pursue only because they so agreed. JA (Am. Compl. ¶ 41). According to respondents, petitioners' failure meaningfully to enter such areas as CLECs "would have been against their self-interest in the absence of a conspiracy" and thus suggests that petitioners conspired. Resp. Br. 43. Respondents' assertion that non-entry was against self-interest absent conspiracy, however, is no more than an inference or characterization, which is insufficient where, as here, it lacks reasonable support in the complaint's factual allegations.[13]

First, the very characterization of ILEC-as-CLEC entry as "especially attractive" is refuted by the complaint itself. The complaint alleges that entry as a CLEC was fraught with obstacles, including the successful resistance of ILECs. JA 11 (Am. Compl. ¶ 4); *see* JA 23-26 (Am. Compl. ¶ 47) (detailing alleged obstacles). Respondents apparently believe that the district court should have disregarded the specific factual allegations of the complaint and credited instead an inconsistent conclusory characterization – that entry was an

---

House Comm. on the Judiciary, 108th Cong., 1st Sess. 77, 79 (July 24, 2003). He testified that, "[i]f at any time we think that we have evidence of a concerted agreement to allocate markets, or to decline to compete, we will act very aggressively against it," but stated that, while the Antitrust Division "monitor[s] this situation very closely," it was "not aware of evidence of any such agreement" by the ILECs. *Id.*

[13] *See Trinko*, 540 U.S. at 410 (rejecting argument that defendant's failure to provide adequate access to network facilities had "no valid business reason" when claim was unsupported by facts and contrary to other allegations in complaint); *DM Research*, 170 F.3d at 56-57 (rejecting argument that alleged conspirator would "benefit" from conspiracy when claim was unsupported by facts and appeared implausible in light of complaint's allegations).

"'especially attractive business opportunity.'" Resp. Br. 44 (quoting Am. Compl. ¶ 40 (JA 21)). But a plaintiff can plead facts that foreclose the plaintiff's claim, and respondents did so here. *See* Pet. Br. 34-36; U.S. Br. 29-30 ("a complaint can plead too much as well as too little and must be judged by the facts actually alleged").

Second, even if the ILEC-as-CLEC opportunity was in some sense "especially attractive" (an opportunity for a "quick buck"), that would not support an inference that petitioners' alleged failure to pursue that opportunity was a departure from ordinary, unilateral business conduct. Antitrust law reflects the basic understanding that businesses in general cannot possibly pursue more than a small fraction of the opportunities that might be characterized as "attractive." Pet. Br. 33-34; U.S. Br. 28-29. In this case, moreover, the complaint alleges that the particular opportunity was attractive only for so long as the regulatory regime on which it rested continued, *see* JA 21, 22 (Am. Compl. ¶¶ 39, 42), and petitioners were successfully challenging that very regime as unlawful.[14]

Beyond these two points – which are themselves sufficient to require dismissal of respondents' complaint – it is evident that respondents' ILEC-as-CLEC argument would not support an inference of collusion even on respondents' own logic. Respondents do not suggest that cross-border entry would be profitable *even if* the neighboring ILEC retaliated (if it were, then agreement would be irrational). Respondents rather claim that cross-border entry would be "especially attractive" only if other ILECs did not retaliate by likewise

---

[14] *See also* JA 42 (Compl. Exh. D) (noting opinion of independent analyst that "[t]he [FCC] is studying current wholesale pricing policies and will likely adjust them," and "[a] company would be wise to wait until that happens before making a move"), 44 (Compl. Exh. E) (noting executive's statement that regulatory requirements "will be revised next year, making it unwise to base a business plan on it"); *Cooper v. Pickett*, 137 F.3d 616, 623 (9th Cir. 1997) ("a court ruling on a motion to dismiss may consider the full texts of documents which the complaint quotes only in part").

entering. *See* Cert. Opp. 20 (quoting a supposed "ILEC insider" asking "[w]hy would [the ILECs] want to start a cross-border battle?"). On that premise, however, there is plainly no *need* for collusion. It is obvious to each ILEC that any cross-border entry would be open and notorious and thus would provoke retaliation, as respondents pleaded and argued. *See* JA 26 (Am. Compl. ¶ 49); Cert. Opp. 20. Each ILEC could therefore be relied upon to decide independently, in its own best interest, against cross-border entry. Collusion is not suggested by each ILEC acting to maintain an existing pattern of service territories that is alleged to be profitable to all of the petitioners. *See* JA 26 (Am. Compl. ¶ 48 (referring to preservation of existing service territories as a "successful" business strategy)).

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for reinstatement of the judgment of the district court dismissing the complaint.

Respectfully submitted,

STEPHEN M. SHAPIRO
KENNETH S. GELLER
RICHARD J. FAVRETTO
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

LAURA J. COLEMAN
J. HENRY WALKER
MARC W.F. GALONSKY
ASHLEY WATSON
BELLSOUTH CORPORATION
1155 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 249-2720
Counsel for BellSouth Corporation

JOHN THORNE
PAUL J. LARKIN, JR.
DAVID E. WHEELER
ROBERT J. ZASTROW
VERIZON COMMUNICATIONS INC.
1515 North Courthouse Road
Arlington, Virginia 22201
(703) 351-3900

DAN K. WEBB
CHARLES B. MOLSTER III
WINSTON & STRAWN LLP
35 W. Wacker Drive
Chicago, Illinois 60601
(312) 558-5856

RICHARD G. TARANTO
FARR & TARANTO
1220 19th Street, N.W., Suite 800
Washington, D.C. 20036
(202) 775-0184
Counsel for Verizon Communications Inc. (successor-in-interest to Bell Atlantic Corporation)

MICHAEL K. KELLOGG
Counsel of Record
MARK C. HANSEN
AARON M. PANNER
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

JAVIER AGUILAR
WILLIAM M. SCHUR
AT&T SERVICES, INC.
175 E. Houston Street, 4th Floor
San Antonio, Texas 78205
(210) 351-3409
Counsel for AT&T Inc. (formerly SBC Communications Inc.)

TIMOTHY BEYER
BROWNSTEIN HYATT & FARBER, P.C.
410 17th Street, 22nd Floor
Denver, Colorado 80202
(303) 223-1116

CYNTHIA P. DELANEY
QWEST COMMUNICATIONS INTERNATIONAL INC.
1801 California Street
Denver, Colorado 80202
(303) 383-6790
Counsel for Qwest Communications International Inc.

November 9, 2006

No. 05-1126

In the Supreme Court of the United States

BELL ATLANTIC CORPORATION, ET AL., PETITIONERS

v.

WILLIAM TWOMBLY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

PAUL D. CLEMENT
Solicitor General
Counsel of Record

THOMAS O. BARNETT
Assistant Attorney General

THOMAS G. HUNGAR
Deputy Solicitor General

DEANNE E. MAYNARD
Assistant to the Solicitor General

CATHERINE G. O'SULLIVAN
JAMES J. O'CONNELL, JR.
HILL B. WELLFORD
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether alleged parallel conduct, together with a conclusory allegation of conspiracy, is sufficient to state a claim under Section 1 of the Sherman Act, 15 U.S.C. 1.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 6
Argument:
Alleged parallel conduct, together with a conclusory allegation of conspiracy, is insufficient to state a claim under Section 1 of the Sherman Act 9
A. A complaint must allege facts providing fair notice to the defendant and demonstrating a reasonably grounded expectation that discovery will yield evidence to support the plaintiff's claim of wrongful conduct 10
B. An allegation of parallel conduct is not by itself sufficient to allege an agreement in violation of Section 1 of the Sherman Act 19
C. The complaint in this case is insufficient 26
Conclusion 30

TABLE OF AUTHORITIES

Cases:

Anza v. *Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006) 14, 15
Aponte-Torres v. *Univ. of Puerto Rico*, 445 F.3d 50 (1st Cir. 2006) 14
Associated Gen. Contractors of Cal., Inc. v. *California State Council of Carpenters*, 459 U.S. 519 (1983) ..... *passim*

Cases—Continued: Page

Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975) 11
Bradley v. *Chiron Corp.*, 136 F.3d 1317 (Fed. Cir. 1998) 15
Browning v. *Clinton*, 292 F3d 235 (D.C. Cir. 2002) 15
Brooke Group Ltd. v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) 20
Cantor Fitzgerald, Inc. v. *Lutnick*, 313 F.3d 704 (2d Cir. 2002) 15
Conley v. *Gibson*, 355 U.S. 41 (1957) 10, 11, 18, 22
DM Research, Inc. v. *College of American Pathologists*, 170 F.3d 53 (1st Cir. 1999) 11, 22
Davila v. *Delta Air Lines, Inc.*, 326 F.3d 1183 (11th Cir.), cert. denied, 540 U.S. 1016 (2003) 15
Dura Pharms., Inc. v. *Broudo*, 544 U.S. 336 (2005). ..... *passim*
Farm Credit Servs. of Am. v. *American State Bank*, 339 F.3d 764 (8th Cir. 2003) 15
Fries v. *Helsper*, 146 F.3d 452 (7th Cir.), cert. denied, 525 U.S. 930 (1998) 15
Heart Disease Research Found. v. *General Motors Corp.*, 463 F.2d 98 (2d Cir. 1972) 5
Jordan v. *Alternative Res. Corp.*, No. 05-1485, 2006 WL 2337333 (4th Cir. Aug. 14, 2006). 15
Leatherman v. *Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993) 12
Matsushita Elec. Indus. Co. v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) 20, 23, 25

Cases—Continued: Page

Mezibov v. *Allen*, 411 F.3d 712 (6th Cir. 2005), cert. denied, 126 s. Ct. 1911 (2006) 15
Morse v. *Lower Merion Sch. Dist.*, 132 F.3d 902 (3d Cir.1997) 15
Monsanto Co. v. *Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) 19, 20
Nagler v. *Admiral Corp.*, 248 F.2d 319 (2d Cir. 1957) ... 24
Papasan v. *Allain*, 478 U.S. 265 (1986) ... 14, 19, 22, 26, 29
Swierkiewicz v. *Sorema N.A.*, 534 U.S. 506 (2002) 15, 16, 23
Theatre Enters., Inc. v. *Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954) 4, 9, 20
United States ex rel. Bain v. *Georgia Gulf Corp.*, 386 F.3d 648 (5th Cir. 2004) 15
United States v. *Philadelphia Nat'l Bank*, 374 U.S. 321 (1963) 1
Tal v. *Hogan*, 453 F.3d 1244 (10th Cir. 2006) 15
Verizon Commc'ns Inc. v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) 25, 27
Woodrum v. *Woodward County*, 866 F.2d 1121 (9th Cir. 1989) 15
Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1968) 1

Statutes and rules: Page

Sherman Act, 15 U.S.C. 1 *et seq.*:
§ 1, 15 U.S.C. 1 ..... *passim*
§ 2, 15 U.S.C. 2 27
Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ..... 2, 27
42 U.S.C. 1983 13
Fed. R. Civ. P.:
Rule 1 19
Rule 8 ..... *passim*
Rule 8(a)(2) 2, 10, 11, 22
Rule 15 18

Miscellaneous:

6 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* (2d ed. 2003) 19, 20, 21
Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* (Supp. 2006) 21
H.R. Conf. Rep. No. 369, 104th Cong., 1st Sess. (1995) 13
2 James Wm. Moore et al., *Moore's Federal Practice* (3d ed. 2006) 12
Donald F. Turner, *The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655 (1962) 20
5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* (3d ed. 2004) 11, 12

In the Supreme Court of the United States

No. 05-1126

BELL ATLANTIC CORPORATION, ET AL., PETITIONERS

v.

WILLIAM TWOMBLY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The Department of Justice, along with the Federal Trade Commission, has responsibility for enforcing the federal antitrust laws, through which it seeks to further "our fundamental national economic policy" of competition. *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 372 (1963). The antitrust laws also provide for enforcement by private parties to serve the same end. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 130-131 (1968). Meritorious private antitrust suits provide an important check against harmful anticompetitive conduct. Meritless antitrust suits, however, do not serve that end. To the contrary, if not promptly dismissed, they create economic inefficiencies, chill procompetitive conduct, and act as a drain on the economy because they force parties either to expend substantial resources to defend themselves or to succumb to *in terrorem* settlement demands. The United States ac-

cordingly has a substantial interest in the proper standard for allowing antitrust suits to move past the motion-to-dismiss stage.

STATEMENT

This case involves allegations that petitioners, four telecommunications companies, conspired in violation of Section 1 of the Sherman Act with resulting injury, compensable by treble damages, to nearly everyone in the continental United States. Section 1 makes unlawful "[e]very contract, combination * * *, or conspiracy, in restraint of trade or commerce." 15 U.S.C. 1. The question presented is what a complaint must allege with respect to the asserted "contract, combination * * *, or conspiracy" in order to state a "claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

1. Respondents brought a putative class action against petitioners alleging, *inter alia*, violation of Section 1 of the Sherman Act.[1] The charged conspiracy allegedly arose in response to the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56. According to the complaint, the 1996 Act places obligations upon incumbent local exchange carriers (ILECs), including petitioners, to provide potential competing local exchange carriers (CLECs) access and connections to their lines and equipment in order to "promote competition in local exchange markets across the country," J.A. 18 (¶ 32), in exchange for being permitted to enter the long-distance telephone market. J.A. 18-19 (¶ 30).

---

[1] The proposed class consists of all persons and entities residing in the continental United States (except Alaska) who are or were subscribers of local telephone service or high speed internet services since February 8, 1996, except for petitioners, those affiliated with them, and any judge assigned to the case. J.A. 28 (¶ 53).

Based on "information and belief pursuant to the investigation of counsel," J.A. 10, the complaint alleges that petitioners "entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets by, among other things, agreeing not to compete with one another and to stifle attempts by others to compete with them." J.A. 11 (¶ 4); see J.A. 27 (¶ 51).[2] In particular, the complaint alleges that petitioners "engaged in parallel conduct in order to prevent competition" from CLECs, including failing to provide the same quality of service to competitors that petitioners provided to their own retail customers, failing to provide access to their operational support systems on a nondiscriminatory basis that places competitors at parity, and refusing to sell to competitors, on just, reasonable, and nondiscriminatory terms, access to components of their networks on an unbundled basis. J.A. 23-26 (¶ 47).

The complaint also alleges that petitioners "refrained from meaningful head-to-head competition in each other's markets." J.A. 21 (¶ 39). The complaint alleges that this failure to compete with one another "would be anomalous in the absence of an agreement," J.A. 21 (¶ 40), given that petitioners' predominance in their respective territories would provide "substantial competitive advantages" in contiguous territories, J.A. 21-22 (¶ 41), and presented "an especially attractive business opportunity," J.A. 21 (¶ 40). In support of the allegation that petitioners were forgoing "lucrative opportunities," J.A. 22 (¶ 43), the complaint quotes an executive of one petitioner as stating that entry into another ILEC's ter-

---

[2] Only two paragraphs of the complaint—those regarding respondents' claims "as to themselves and their own actions"—set forth allegations that are based on respondents' "own knowledge." J.A. 10.

ritory "might be a good way to turn a quick dollar but that doesn't make it right." J.A. 22 (¶ 42).

The complaint further alleges that the conspiracy began "at least as early as February 6, 1996" and has continued thereafter, J.A. 30 (¶ 64); petitioners communicated at unspecified meetings of a "myriad of organizations," J.A. 23 (¶ 46); petitioners had motive to conspire, J.A. 26-27 (¶ 50); and petitioners engaged in substantial conduct in furtherance of the conspiracy, J.A. 23-26 (¶ 47). The complaint does not, however, set forth direct support for the existence of any actual agreement between petitioners. See Pet. App. 31a (noting that "the amended complaint does not identify specific instances of conspiratorial conduct or communications").

2. The district court dismissed the complaint for failure to state a claim. Pet. App. 35a-58a. The court recognized that "there is no special pleading standard for conspiracy." *Id.* at 42a. Moreover, while noting that a conspiracy under the Sherman Act may be inferred from "parallel business behavior that suggest[s] an agreement," the court cautioned that "'conscious' parallelism" is not sufficient. *Id.* at 41a (quoting *Theatre Enters., Inc.* v. *Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954)). The court observed that "similar market actors with similar information and economic interests will often reach the same business decisions." *Ibid.* Accordingly, the court concluded that "simply stating that defendants engaged in parallel conduct, and that this parallelism must have been due to an agreement, would be equivalent to a conclusory, 'bare bones' allegation of conspiracy," and therefore insufficient to state a claim. *Id.* at 42a.

Applying those general principles, the court considered whether respondents had alleged facts "suspicious

enough to suggest that [petitioners] are acting pursuant to a mutual agreement rather than their own individual self-interest." Pet. App. 46a. The court held that the complaint's allegations provide "no reason to believe that [petitioners'] parallel conduct was reflective of any agreement." *Id.* at 58a. The court concluded that the alleged "behavior of each ILEC in resisting the incursion of CLECs is fully explained by the ILEC's own interests in defending its individual territory." *Id.* at 48a. And, although it noted that petitioners' alleged failure to enter each others' markets presented a "closer question," *id.* at 50a, the court concluded that certain assumptions on which the complaint's theory rested were "severely undermined" by other alleged facts, *id.* at 51a, such that the complaint did not allege facts raising an inference of conspiracy, *id.* at 57a.

Respondents filed a notice of appeal, without seeking leave to replead their claims. See J.A. 4-5.

3. The court of appeals vacated and remanded, Pet. App. 2a-34a, concluding that the district court had applied the wrong legal standard. *Id.* at 10a. The court of appeals acknowledged that "a barebones statement of conspiracy * * * without any supporting facts permits dismissal." *Id.* at 16a (quoting *Heart Disease Research Found.* v. *General Motors Corp.*, 463 F.2d 98, 100 (2d Cir. 1972)). But the court held that a complaint alleging a violation of Section 1 is sufficient if the "pleaded factual predicate" includes conspiracy among "the realm of 'plausible' possibilities." *Ibid.* In the court's view, a complaint can suffice by "a pleading of facts indicating parallel conduct by the defendants." *Id.* at 25a. The court stated that such allegations would be insufficient only if "there is no set of facts that would permit a plaintiff to

demonstrate that the particular parallelism asserted was the product of collusion." *Ibid.*

Applying its legal standard, the court of appeals concluded that the complaint's factual allegations were sufficient, at least at the pleading stage, and that they provided petitioners with sufficient notice of respondents' claim. Pet. App. 30a-33a. With respect to the allegation that petitioners conspired to keep CLECs from entering their respective markets, the court relied upon the complaint's allegations that petitioners had ample opportunity to communicate with one another and a common incentive to conspire. *Id.* at 32a. With respect to the allegation that petitioners conspired not to enter one another's markets as CLECs, the court relied upon the complaint's allegations that, although petitioners had an economic incentive to enter the geographic areas that each surrounded, none had meaningfully done so. *Id.* at 31a.[3]

SUMMARY OF ARGUMENT

A. The Federal Rules of Civil Procedure provide that a complaint must set forth a claim showing that the plaintiff is entitled to relief, and require that the complaint provide fair notice to the defendant of the nature of the plaintiff's claim and the grounds upon which the claim is based. To meet those criteria, a complaint must allege, at a minimum, a sufficient factual predicate to provide meaningful notice to the defendant and to demonstrate a reasonable basis for inferring that the alleged conduct may be wrongful. The allegations, in other

[3] The court of appeals stated in a footnote that respondents appeared to be able to plead that petitioners had engaged "in parallel conduct against their self-interest," which the court noted was a "'plus factor' that, if proved at trial, can support the inference of collusion necessary for a jury finding of conspiracy." Pet. App. 32a-33a n.15. But the decision below did not turn on that supposition.

words, must provide a "reasonably founded hope" that the discovery process will reveal relevant evidence to support the claim. *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 347 (2005). Whether the factual predicate alleged is sufficiently concrete to warrant further proceedings turns on the applicable substantive law. Conclusory assertions regarding crucial elements of the plaintiff's case do not suffice.

Moreover, the extent of the factual predicate necessary to give the defendant "fair notice" depends on the context and complexity of the case. Although minimal factual allegations may suffice to apprise a defendant of the plaintiff's claim in a simple case, it is essential that a district court "retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Associated Gen. Contractors of Cal., Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983). Otherwise, a plaintiff could tie up significant judicial and other resources, and potentially force a substantial settlement, even though it alleges a vague and "largely groundless claim." *Dura Pharms.*, 544 U.S. at 347.

B. Those principles demand more than mere allegations of parallel conduct and conclusory allegations of an agreement or conspiracy in the context of a complex antitrust suit. To be sure, evidence of parallel conduct may at times provide important circumstantial evidence supporting an inference of agreement in a suit alleging a violation of Section 1 of the Sherman Act. But parallel conduct is to be expected even in fully competitive markets and, standing alone, provides an insufficient basis for inferring an illegal agreement. Moreover, a conclusory assertion of a conspiracy or agreement does not suffice to convert allegations of parallel conduct into a

sufficient claim of a Section 1 violation. Because an agreement is the critical factor distinguishing innocuous parallel conduct from a Section 1 violation, courts must insist on more than mere conclusory allegations of that element. The court of appeals' standard—which would appear to require nothing more than allegations of parallel conduct and a conclusory allegation of conspiracy—is clearly insufficient.

C. Although the question is a close one, the complaint here is insufficient under proper application of Rule 8 pleading standards. At bottom, the complaint merely alleges two types of parallel business conduct, together with a conclusory assertion of an agreement. With respect to petitioners' alleged actions to prevent entry into their respective markets by CLECs, those actions were (as respondents conceded) entirely consistent with each individual petitioner's economic self-interest, and the complaint alleged no factual predicate sufficient to suggest that such behavior was the result of collusion. With respect to petitioners' alleged failure to enter each others' markets as CLECs, the complaint does assert that such parallel lack of entry would be "anomalous in the absence of an agreement." But the complaint offers nothing but conclusory assertions in support of that statement, and the facts actually alleged in the complaint indicate nothing anomalous about that parallel inaction. In the end, the complaint fails to provide petitioners with fair notice of either the basis or theory of respondents' claim and is insufficient to give rise to a reasonably grounded expectation that discovery will reveal relevant evidence of an illegal agreement.

ARGUMENT

ALLEGED PARALLEL CONDUCT, TOGETHER WITH A CONCLUSORY ALLEGATION OF CONSPIRACY, IS INSUFFICIENT TO STATE A CLAIM UNDER SECTION 1 OF THE SHERMAN ACT

The court of appeals adopted a legal standard that treats allegations of parallel conduct, accompanied by a conclusory allegation of an agreement, as sufficient to state a violation of Section 1 of the Sherman Act for purposes of surviving a motion to dismiss. That legal standard is wrong and has the potential to chill substantial economic activity that is both efficient and innocuous from the standpoint of the antitrust laws. The standard fails to account for an important aspect of substantive antitrust law and misapplies the law of pleading.

As a matter of substantive antitrust law, it has long been clear that mere parallel conduct, even consciously parallel conduct, does not violate Section 1. See, *e.g.*, *Theatre Enters., Inc.* v. *Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954). Indeed, such conduct is commonplace and often efficient. Of course, parallel conduct can result from an agreement between competitors, and such an agreement could violate Section 1. But an allegation of agreement under Section 1 must rest on something more than allegations of parallel conduct, lest commonplace and efficient economic behavior provide a sufficient basis for costly litigation over largely groundless claims.

Nor can a mere conclusory allegation of an agreement or conspiracy suffice to convert allegations of parallel conduct into an adequate allegation of a violation of Section 1. It is well established that conclusory allegations of wrongful conduct are insufficient. The requirements

of Rule 8 are not demanding. But they do require the plaintiff to allege sufficient facts to put the defendant on fair notice of the claims and to demonstrate a reasonable basis for inferring that the defendant may have engaged in wrongful conduct, or as the Court put it in *Dura Pharmaceuticals*, a "reasonably founded hope that the [discovery] process will reveal relevant evidence" sufficient to establish the plaintiff's claim. 544 U.S. at 347. In the context of a Section 1 claim, those standard pleading rules require more than allegations of parallel conduct, with or without a conclusory allegation of an agreement or conspiracy. Although it is a close case, applying that standard to the complaint at issue here, the district court was correct to dismiss the complaint.

A. A Complaint Must Allege Facts Providing Fair Notice To The Defendant And Demonstrating A Reasonably Grounded Expectation That Discovery Will Yield Evidence To Support The Plaintiff's Claim Of Wrongful Conduct

Rule 8 of the Federal Rules of Civil Procedure requires a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). To be sure, that requirement is "not meant to impose a great burden upon a plaintiff." *Dura Pharms.*, 544 U.S. at 347. But this Court has made clear that the requirement is a meaningful one, and that it serves several significant purposes.

To satisfy Rule 8(a)(2), a complaint must meet two fundamental criteria. First, it must "set forth a claim upon which relief could be granted." *Conley* v. *Gibson*, 355 U.S. 41, 45 (1957). Second, it must give the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Id.* at 47. A complaint cannot fulfill those criteria without alleging sufficient

facts to provide concrete notice of the alleged wrongdoing and, putting conclusory allegations to one side, a reasonable basis for inferring that there may be wrongful conduct, *i.e.*, to demonstrate a "reasonably founded hope that the [discovery] process will reveal relevant evidence" sufficient to establish the plaintiff's claim. *Dura Pharms.*, 544 U.S. at 347 (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 741 (1975)).

Thus, while Rule 8(a)(2) does not require factual allegations to be set out "in detail," see *Conley*, 355 U.S. at 47, it does require sufficient facts to provide fair notice and to give rise to a reasonably grounded expectation that discovery will produce relevant evidence to support the claims. See *Dura*, 544 U.S. at 347; *DM Research, Inc.* v. *College of Am. Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999) (complaint must set forth "a *factual* predicate concrete enough to warrant further proceedings"). In the absence of direct and non-conclusory allegations on every material point, the complaint "must contain allegations from which an inference fairly may be drawn by the district court that evidence on these material points will be available and introduced at trial." 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1216, at 220-227 (3d ed. 2004). Otherwise, a plaintiff with "a largely groundless claim" would be permitted to "simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value." *Dura Pharms.*, 544 U.S. at 347; see *DM Research*, 170 F.3d at 55 (observing that alleging a sufficient factual predicate is "the price of entry, even to discovery").

Whether a complaint contains allegations sufficient to provide fair notice and to demonstrate a reasonable basis for inferring that the defendant may have engaged in

wrongful conduct must be measured against the substantive legal standards applicable to that claim. See, *e.g.*, *Dura Pharms.*, 544 U.S. at 341-342. Especially when a particular element critically distinguishes innocuous (or, indeed, desirable) conduct from wrongdoing, allegations concerning that element must be concrete, rather than conclusory. A complaint's allegations also must be judged in the context of the particular case. "Whether a statement of a claim is sufficient to give fair notice depends in part on the complexity of the case." 2 James Wm. Moore et al., *Moore's Federal Practice* § 8.04[1][a], at 8-24.1 (3d ed. 2006). Thus, as this Court has observed, in cases of "magnitude," a district court "must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Associated Gen. Contractors*, 459 U.S. at 528 n.17. Moreover, in allegations of misconduct by large corporations, it is reasonable to insist on something more than vague allegations concerning the corporate principal.

In short, "the appropriate level of generality for a pleading depends on the particular issue in question or the substantive context of the case before the court." 5 Wright & Miller, *supra*, § 1218, at 273. That is not a "heightened pleading" standard, but is simply a recognition that, under ordinary pleading requirements, not all federal pleadings "are intended to exhibit the same degree of specificity." *Id.* § 1221, at 290.[4]

---

[4] In *Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), the Court suggested that such a context-specific inquiry under Rule 8 is not the same as requiring a heightened pleading standard. In that case, the defendants contended that "the degree of factual specificity required of a complaint by the Federal Rules of Civil Procedure varies according to the complexity of the underlying substantive law." *Id.* at 167. The Court did not reject

Thus, in *Dura Pharmaceuticals*, this Court measured the plaintiffs' securities-fraud allegations against the applicable substantive law, which requires proof that the defendants proximately caused economic loss to the plaintiffs. Against that standard, the Court held that the complaint fell short of ordinary pleading requirements. 544 U.S. at 346-348. Although the complaint did allege that plaintiffs suffered "damage[s]" caused by paying "artificially inflated prices," *id.* at 347, it provided no factual allegations regarding "what the relevant economic loss might be or of what the causal connection might be between that loss and the misrepresentation," *ibid.* In holding that complaint insufficient, the Court considered the potential magnitude of the case, and the policies behind the securities laws, which sought in part to prevent "'abusive' practices including 'the routine filing of lawsuits . . . with only a faint hope that the discovery process might lead eventually to some plausible cause of action.'" *Ibid.* (quoting H.R. Conf. Rep. No. 369, 104th Cong., 1st Sess. 31 (1995)).

As demonstrated by the *Dura Pharmaceuticals* Court's rejection of the plaintiffs' bare allegation of "damage[s]," conclusory assertions regarding crucial elements of a plaintiff's case are not sufficient to provide fair notice or to demonstrate a reasonably grounded expectation that discovery will produce evidence to sustain the plaintiff's claim. Rather, a district court can properly insist on "some specificity in pleading." *Associated Gen. Contractors*, 459 U.S. at 528 n.17. That is particu-

---

that principle, but instead ruled against the defendants because it concluded that the court of appeals had not applied the standards of Rule 8, but had instead created a "heightened pleading" standard specifically for civil rights claims alleging municipal-liability under Section 1983 of Title 42. *Id.* at 167-168.

larly true when that element critically distinguishes between innocuous and unlawful conduct. Furthermore, although a court must take all of the "well-pleaded factual allegations in the complaint as true," and construe them "in the light most favorable" to the plaintiff, *Papasan* v. *Allain*, 478 U.S. 265, 283 (1986), a court is "not bound to accept as true a legal conclusion couched as a factual allegation," *id.* at 286.

This Court has repeatedly confirmed the principle that conclusory allegations are insufficient to meet a pleader's burden under Rule 8. In *Papasan*, the Court disregarded plaintiffs' allegation that they had been "deprived of a minimally adequate education" because the plaintiffs "allege[d] no actual facts in support of their assertion." See 478 U.S. at 286 (noting that plaintiffs did not allege "that schoolchildren * * * are not taught to read or write" or "that they receive no instruction on even the educational basics"). Similarly, in *Anza* v. *Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006), although the plaintiff alleged that the defendants' racketeering acts were "aimed at 'gain[ing] sales and market share at [the plaintiff's] expense" and succeeded in giving the defendants a "competitive advantage" over the plaintiff, *id.* at 1994-1995, the Court held that the complaint was insufficient to allege proximate causation. See 126 S. Ct. at 1996-1998. The Court looked beyond the bare allegations that the plaintiff had "suffered its own harms" as a result of the defendants' actions to consider whether the underlying factual allegations supported a violation of the applicable substantive law. *Id.* at 1997-1998.[5]

---

[5] All of the courts of appeals are in agreement that conclusory allegations should be disregarded. See, *e.g.*, *Aponte-Torres* v. *University of P.R.*, 445 F.3d 50, 55 (1st Cir. 2006) ("We ought not * * * credit 'bald assertions, unsupportable conclusions, periphrastic circumlocu-

This Court's decision in *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506 (2002), is not to the contrary. In *Swierkiewicz*, the Court rejected the assertion that "a complaint in an employment discrimination lawsuit must contain specific facts establishing a prima facie case of dis-

---

tions, and the like.'"); *Cantor Fitzgerald, Inc.* v. *Lutnick*, 313 F.3d 704, 709 (2d Cir. 2002) ("'[W]e give no credence to plaintiff's conclusory allegations.'"); *Morse* v. *Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997) ("[A] court need not credit a complaint's 'bald assertions' or 'legal conclusions' when deciding a motion to dismiss."); *Jordan* v. *Alternative Res. Corp.*, No. 05-1485, 2006 WL 2337333, at *10 (4th Cir. Aug. 14, 2006) (stating that "we have rejected reliance on similar conclusory allegations" at the pleading stage); *United States ex rel. Bain* v. *Georgia Gulf Corp.*, 386 F.3d 648, 654 (5th Cir. 2004) ("'[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.'"); *Mezibov* v. *Allen*, 411 F.3d 712, 716 (6th Cir. 2005) (same), cert. denied, 126 S. Ct. 1911 (2006); *Fries* v. *Helsper*, 146 F.3d 452, 457 (7th Cir.) ("[M]ere conclusory allegations of a conspiracy are insufficient to survive a motion to dismiss."), cert. denied, 525 U.S. 930 (1998); *Farm Credit Servs. of Am.* v. *American State Bank*, 339 F.3d 764, 767 (8th Cir. 2003) ("[W]e are 'free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations.'"); *Woodrum* v. *Woodward County*, 866 F.2d 1121, 1126 (9th Cir. 1989) (stating that "conclusory allegations that [defendants] conspired do not support a claim"); *Tal* v. *Hogan*, 453 F.3d 1244, 1261 (10th Cir. 2006) ("Bare bones accusations of a conspiracy without any supporting facts are insufficient to state an antitrust claim."); *Davila* v. *Delta Air Lines, Inc.*, 326 F.3d 1183, 1185 (11th Cir.) ("[C]onclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal."), cert. denied, 540 U.S. 1016 (2003); *Browning* v. *Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002) ("[W]e accept neither 'inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint,' nor 'legal conclusions cast in the form of factual allegations.'"); *Bradley* v. *Chiron Corp.*, 136 F.3d 1317, 1322 (Fed. Cir. 1998) ("Conclusory allegations of law and unwarranted inferences of fact do not suffice to support a claim.").

crimination under the framework set forth by this Court in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973)." *Id.* at 508. The Court explained that the *McDonnell Douglas* burden-shifting framework is merely one way to establish liability in a discrimination case, not an element of the cause of action, and that "the *McDonnell Douglas* framework does not apply in every employment discrimination case." *Id.* at 511. But the Court nowhere relieved the plaintiff of the requirement to allege a factual predicate sufficient to provide notice and to demonstrate a reasonable basis for inferring that the defendant may have engaged in wrongful conduct.

To the contrary, the *Swierkiewicz* Court emphasized that the "complaint detailed the events leading to [the plaintiff's] termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination." 534 U.S. at 514. The complaint thus gave sufficient notice in the context of that case, *ibid.*, especially given the simplicity of the issues and the factual allegations suggesting a reasonably grounded expectation that discovery would produce relevant evidence of national origin and age discrimination. See *id.* at 508-509 (noting that the complaint alleged the name of the company officer who had discriminated against the plaintiff, a statement by that officer that he wanted to "energize" the plaintiff's department, and the identity and experience of the less-qualified individual who had been promoted in the plaintiff's place).

As the district court correctly observed, this case is not analogous to a simple employment-discrimination claim, in which the factual predicate is "fairly self-evident" and "the defendant will be apprised of the basic facts, and will know how to defend." Pet. App. 45a. The

complaint alleges a nationwide conspiracy, spanning more than a decade, among four major telecommunications firms with vast numbers of employees. In a case of this immensity—with its wide array of potentially relevant witnesses who might or might not have been involved in the alleged conspiracy, and the sweeping geographic and temporal scope of the allegations—the factual predicate is anything but self-evident, and the complaint fails to provide concrete notice of the alleged wrongdoing. Given that such a case involves a "potentially massive factual controversy," more "specificity in pleading" is required. *Associated Gen. Contractors*, 459 U.S. at 528 n.17. There are countless different factual predicates that could hypothetically sustain a far-reaching conspiracy claim, and a plaintiff therefore must provide a factual predicate that is sufficient to give the defendant notice of the theory of the plaintiff's claim. See *Dura Pharms.*, 544 U.S. at 347 (holding that, in a complex securities-fraud case, the complaint must "provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind"). A conclusory allegation that somewhere along the line there was an unlawful agreement does little to provide concrete notice or sufficient allegations of wrongdoing that can be tested through discovery.[6]

---

[6] The sample form complaints attached to the Federal Rules demonstrate that the specificity required of the factual allegations turns on the nature of the particular claim. The forms for certain simple actions (*e.g.*, Fed. R. Civ. P. App. Form 5 for Goods Sold and Delivered) suggest the need for fewer factual allegations than the forms for more complex actions (*e.g.*, Fed. R. Civ. P. App. Form 17 for Infringement of Copyright and Unfair Competition). But all of the forms include factual predicates sufficient, in the context of the particular legal claim at issue, to provide the defendant with fair notice of the grounds upon which the claim rests and to demonstrate that the plaintiff has a reasonably

Moreover, in deciding whether a complaint's allegations are sufficient to create the requisite reasonably grounded expectation of establishing a claim, it is "not * * * proper to assume that [the plaintiff] can prove facts that it has not alleged." *Associated Gen. Contractors*, 459 U.S. at 526. The Federal Rules allow liberal amendment of pleadings, and a plaintiff who can cure a deficient complaint generally has an opportunity (and an obligation) to do so to avoid dismissal. See Fed. R. Civ. P. 15; *Associated Gen. Contractors*, 459 U.S. at 526 n.11.

To be sure, the Court has stated that a complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46. But that statement cannot mean, as the court of appeals apparently thought (Pet. App. 25a), that a complaint is sufficient as long as the allegations in the complaint do not themselves foreclose relief. Otherwise, that statement would preclude dismissal even of totally conclusory complaints that provide virtually no factual predicate for the alleged injury. Instead, the "set of facts" that might be proved must actually be alleged in the complaint, or at least be fairly inferred from facts so alleged. See *Associated Gen. Contractors*, 459 U.S. at 526. Thus, in *Dura Pharmaceuticals*, although the Court acknowledged the possibility of factual scenarios under which the purchase of securities at inflated prices would lead to an economic loss, 544 U.S. at 343, it did not assume that the plaintiffs could prove one of those scenarios, because the plaintiffs had merely alleged "damage[s]" caused by paying "artificially inflated prices," without identifying or implying any viable theory by

---

grounded expectation of uncovering relevant evidence to prove its claim through discovery.

which loss causation might actually be established. *Id.* at 343, 347-348. Likewise, in *Papasan*, although the plaintiffs alleged that they had been "deprived of a minimally adequate education," the Court concluded that assertion was insufficient given the lack of any concrete factual allegations to support it. 478 U.S. at 286.

At bottom, Rule 8 should be "construed and administered to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. In the context of the complex and wide-ranging antitrust conspiracy alleged here, that mandate cannot be met unless Rule 8 requires respondents to allege a factual predicate that is sufficiently concrete to provide meaningful notice of the alleged wrongdoing and a reasonable basis for inferring that the alleged conduct may be wrongful, *i.e.*, in this context, may reflect an agreement.

B. An Allegation Of Parallel Conduct Is Not By Itself Sufficient To Allege An Agreement In Violation Of Section 1 Of The Sherman Act

1. To prove a violation of Section 1 of the Sherman Act, a plaintiff must establish, among other things, the existence of an agreement. 15 U.S.C. 1. The plaintiff may establish an agreement either through direct evidence or by inference from circumstantial evidence. Proof of parallel conduct by the alleged conspirators can be relevant in proving an illegal conspiracy by means of circumstantial evidence. See *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984); see also 6 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1410, at 60 (2d ed. 2003).

It is well established, however, that "proof of parallel business behavior" does not "conclusively establish[] agreement" and that "such behavior itself" does not

"constitute a Sherman Act offense." *Theatre Enters.*, 346 U.S. at 541. Even "conscious parallelism" is "not in itself unlawful." *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993). A plaintiff who seeks to establish an agreement through circumstantial evidence and allegations of parallel conduct thus cannot survive a motion for summary judgment without producing evidence that "'tends to exclude the possibility' that the alleged conspirators acted independently." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (quoting *Monsanto*, 465 U.S. at 764).

That is so because parallel action is a hallmark of competitive markets. As firms compete, they spur each other to reduce prices, increase quality, and offer more and better services, following the most efficient business models. As less efficient firms lose sales, the market often is left with firms with similar cost structures that offer similar products and services at similar prices. And as underlying costs change, prices in the market may rise and fall in parallel. Firms may adopt the same practices because they are the most reliable, the most efficient, the most familiar to customers, or the most clearly in compliance with a regulatory regime. See, *e.g.*, Donald F. Turner, *The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 658-659, 681 (1962). Moreover, firms in a regulated industry may react to common regulatory incentives in similar ways. 6 Areeda & Hovenkamp, *supra*, ¶ 1425, at 168 (noting that one nonconspiratorial explanation for parallel conduct is that "[e]ach actor may simply have responded in an obviously reasonable way to a common external stimulus"). In short, parallel action is common and by itself raises *no*

reasonable inference of conspiracy. See *id.* ¶ 1410, at 60 ("[T]here is no basis for inferring any kind of agreement from * * * mere parallel behavior."); *id.* ¶ 1417(g), at 115 ("Mere parallelism * * * is widely present, especially in perfectly competitive markets, and is not itself a compelling subject for legal control.").

Parallel *inaction* is even less suggestive of illicit agreement. In particular, "parallel decisions by business firms not to enter new markets create no such inference." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 307d, at 155 (Supp. 2006). "Firms do not expand without limit and none of them enters every market that an outside observer might regard as profitable, or even a small portion of such markets." *Ibid.* Thus, drawing inferences from what a business fails to do is a problematic exercise; one can analyze the harms and benefit of an action as a discrete matter, but the number of territories a business does not enter or products it does not offer is virtually infinite. Even the most vigorous rivals will end up not competing in some respects.

Accordingly, factual allegations indicating only that defendants engaged in parallel conduct, without more, cannot be treated as sufficient. Nor can such a complaint be saved by adding an unadorned allegation of the existence of a "conspiracy" or an "agreement." Although an agreement is the hallmark of a Section 1 conspiracy, it is also the only thing that divides perfectly lawful parallel behavior from an unlawful conspiracy to restrain trade. Thus the bare allegation of an agreement, with or without alleged instances of parallel conduct, is not enough. Like the allegation of being "deprived of a minimally adequate education" in *Papasan*, such an allegation is little more than a legal label in the context of a Section 1 claim, unless there are allegations of "actual facts in sup-

port of [the] assertion." 478 U.S. at 286. As Chief Judge Boudin has explained, "terms like 'conspiracy,' or even 'agreement,' are border-line: they might well be sufficient in conjunction with a more specific allegation * * * but a court is not required to accept such terms as a sufficient basis for a complaint." *DM Research*, 170 F.3d at 56. It is one thing to allege a specific agreement between particular representatives of companies at a specific time and place, but a mere allegation of an agreement to engage in parallel action or inaction stands on a different footing. And adding detailed allegations about parallel conduct, which absent an agreement would not violate the antitrust laws, simply does not add up to a well-pleaded complaint under Rule 8(a)(2), because once the conclusory allegation is properly disregarded, the complaint fails to "set forth a claim upon which relief could be granted." *Conley*, 355 U.S. at 45.

Moreover, as the district court here recognized, see Pet. App. 45a, such a complaint fails to give the requisite "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley*, 355 U.S. at 47. "[A] plaintiff's factual and economic theory of a conspiracy is not evident from a conclusory allegation of conspiracy, and there is simply no way to defend against such a claim without having some idea of how and why the defendants are alleged to have conspired." Pet. App. 45a. District courts must retain the authority to enforce the requirement of fair notice, which has particular force in cases of the complexity and magnitude of most class-action antitrust suits, see *Associated Gen. Contractors*, 459 U.S. at 528 n.17, such as the "far-reaching" claims at issue here, Pet. App. 5a.

That is not to say that a complaint asserting a claim under Section 1 of the Sherman Act must allege facts

that would be sufficient to defeat summary judgment under the standard articulated in *Matsushita Electric*. 475 U.S. at 588. No special rules of pleading apply to antitrust cases, and accordingly there is no absolute requirement that a complaint alleging an antitrust conspiracy must be dismissed unless it alleges facts sufficient to establish the so-called "plus factors" that would ultimately be required to prove the existence of an illegal agreement by means of circumstantial evidence. Cf. *Swierkiewicz*, 534 U.S. at 510-511 (holding that a plaintiff need not allege, at the pleading stage in an employment discrimination case, a prima facie case under the *McDonnell Douglas* burden-shifting framework).

Although there are no special pleading rules for antitrust cases, the very fact that parallel conduct can provide circumstantial evidence of an agreement, yet absent an agreement such conduct is commonplace and innocuous (indeed, often efficient), calls for careful parsing of a Section 1 complaint. A Section 1 complaint must allege, at a minimum, facts providing concrete notice of the claimed wrongdoing and some objectively reasonable basis for inferring that an unlawful agreement may explain the parallel conduct. See *Dura Pharms.*, 544 U.S. at 347. A plaintiff should not be allowed to exact the societal costs inherent in pursuing a complex antitrust case based on "a largely groundless claim." *Ibid.* Thus, the proper standard requires sufficient factual allegations to demonstrate at least a reasonably grounded expectation that discovery will reveal evidence of an illegal agreement. *Ibid.* Such allegations might include, for example, circumstances relating to the timing of events such as particular jointly attended meetings that by their nature and context tend to suggest an agreement, or to the in-

volvement of the alleged conspirators in joint activities during reasonably specified periods of time.

2. The court of appeals did not apply the proper pleading standard in this case. The court recognized that a well-pleaded Section 1 complaint must allege, in addition to the existence of a conspiracy, a "sufficient supporting factual predicate on which that allegation is based." Pet. App. 25a. But the court believed that allegations of parallel conduct, standing alone, could supply such a predicate: "a pleading of facts indicating parallel conduct by the defendants can suffice to state a plausible claim of conspiracy." *Ibid.* (citing *Nagler* v. *Admiral Corp.*, 248 F.2d 319, 325 (2d Cir. 1957)). In the view of the court of appeals, such allegations were sufficient unless "there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence," *ibid.*, a standard that the court of appeals apparently understood to mean that dismissal is inappropriate as long as it is possible to *hypothesize* factual circumstances, *not* alleged or suggested in the complaint, under which liability could exist.

Under that standard, virtually any complaint that points to instances of parallel conduct would be sufficient, because the existence of an agreement to engage in that conduct nearly always would provide one possible explanation for the parallel conduct. In essence, the court of appeals' standard allows improper assumptions that the plaintiff "can prove facts that it has not alleged," *Associated Gen. Contractors*, 459 U.S. at 526, because mere allegations of parallel conduct do not create a sufficient basis to infer the existence of an agreement. Parallel conduct is often economically efficient and is commonplace. If alleging such common and innocuous conduct,

with or without an accompanying conclusory allegation of agreement, is a sufficient basis for discovery, there is a risk of chilling substantial efficient economic activity. As this Court cautioned in evaluating the sufficiency of another antitrust complaint, such "[m]istaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'" *Verizon Commc'ns Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (quoting *Matsushita*, 475 U.S. at 594).

The court of appeals' standard perversely risks turning a sign of healthy competition into a green light for strike suits and *in terrorem* settlement demands. Indeed, the court of appeals acknowledged the harmful effects of its standard, noting "the sometimes colossal expense of undergoing discovery, that such costs themselves likely lead defendants to pay plaintiffs to settle what would ultimately be shown to be meritless claims, that the success of such meritless claims encourages others to be brought, and that the overall result may well be a burden on the courts and a deleterious effect on the manner in which and efficiency with which business is conducted." Pet. App. 30a.

The court of appeals mistakenly believed that it was helpless to avoid those harms. Pet. App. 30a. In reality, the careful application of ordinary pleading principles recognized by this Court, with appropriate cognizance of the fine line that separates unlawful agreements from innocuous parallel conduct, provides ample basis for insisting upon fair notice, disregarding conclusory allegations, and requiring that pleadings set forth factual allegations that are sufficient to give rise to a reasonably grounded expectation that discovery will reveal relevant evidence to support the claim.

C. The Complaint In This Case Is Insufficient

While presenting a close question, the complaint here ultimately fails to state a claim under the proper application of Rule 8 pleading principles. To be sure, the complaint makes a bare assertion of an agreement between identified companies to restrain trade. J.A. 27 (¶ 51). But that is simply "a legal conclusion couched as a factual allegation," *Papasan*, 478 U.S. at 286, which the complaint seeks to draw "in light of" its other allegations. J.A. 27 (¶ 51). When the conclusory assertions elsewhere in the complaint are disregarded, as they must be, and the complaint is reduced to the factual allegations actually pleaded, the complaint is insufficient. Properly construed, the complaint does not give rise to a reasonably grounded expectation that discovery will reveal relevant evidence to support respondents' Sherman Act claim, and it fails to provide the requisite fair notice to petitioners of the basis for that claim.

The complaint alleges a single, two-pronged conspiracy based entirely upon "information and belief." J.A. 10; see note 2, *supra*. First, the complaint alleges that each petitioner engaged in a number of "wrongful" measures to impede the entry of CLECs into their respective markets. See J.A. 23-26 (¶ 47). Those measures include failing to provide the same quality of service to petitioners' competitors as to their own retail customers, failing to provide CLECs access to their operational support systems on a nondiscriminatory basis, and refusing to sell unbundled-network elements to CLECs on just, reasonable, and nondiscriminatory terms. *Ibid.*

Those allegations of parallel conduct, standing alone, create no reasonable inference that the conduct was the result of collusion between petitioners. As respondents

conceded in the district court, "it is in each ILEC's individual economic interest to attempt to keep CLECs out of its market." Pet. App. 48a (citing 08/01/03 Hearing Tr. 29 (J.A. 100)).[7] And, as the district court explained, "since the ILECs are similar firms with similar information and interests, they could rationally expect that each of them will reach the same conclusions as to the course of action that best suits their interests." *Id.* at 49a.

The court of appeals (Pet. App. 32a) nevertheless concluded that those allegations were sufficient, because respondents also alleged that petitioners had opportunities to conspire through industry organizations at unspecified times through unspecified persons, J.A. 23 (¶ 46), and a common motive to do so because such a conspiracy would mutually reinforce their respective efforts to prevent competition in their own territories, J.A. 26 (¶ 50). But an abstract opportunity and some incentive to conspire almost always exists among competitors, so alleging such a truism does nothing to create a reasonably grounded expectation that discovery will reveal that petitioners agreed to do what is conceded to be in their self-interest in any event. In the absence of more specific allegations, the complaint is inadequate to place petitioners on fair notice of the grounds upon which respondents' claim rests.

---

[7] Even if an ILEC's unilateral failure to assist a rival telecommunications carrier violates the Telecommunications Act of 1996, that violation does not alone establish a violation of Section 2 of the Sherman Act. See *Verizon Commc'ns Inc.*, 540 U.S. at 407-408. Moreover, the fact that the 1996 Act independently forbids some of the alleged conduct may reflect an assumption that, absent those statutory prohibitions, it would be in the ILEC's economic self-interest to limit CLEC access. Of course, an agreement among ILECs to refuse such assistance likely would violate Section 1 of the Sherman Act.

The charged conspiracy's second prong—that petitioners have acted in parallel to refrain from meaningful entry into other petitioners' territories—comes closer to satisfying Rule 8, but it too falls short. As noted, parallel conduct, standing alone, creates no inference of collusion; parallel inaction is even less likely to be the result of an agreement. See Areeda & Hovenkamp, *supra*, ¶ 307d, at 155. The court of appeals (Pet. App. 31a-32a) concluded that the allegations were sufficient, however, because the complaint also alleges that entry by an ILEC as a CLEC into a neighboring ILEC's territory would be "an especially attractive business opportunity," J.A. 21 (¶ 40), because the entering ILEC would have "substantial competitive advantages." J.A. 21 (¶ 41). The complaint supports its assertion that entering as a CLEC would be a "lucrative" business opportunity, J.A. 22 (¶ 43), by quoting one ILEC executive as stating that it "might be a good way to turn a quick dollar but that doesn't make it right," J.A. 22 (¶ 42).

The complaint does not identify the "substantial competitive advantages," however, and elsewhere suggests that they would be illusory, see p. 3, *infra*. Moreover, the complaint's assertion that entry into another ILEC's territory as a CLEC was likely to be "lucrative" was supported only by a statement of an ILEC executive that was taken out of context. As the district court explained (Pet. App. 56a), the article in which the statement was reported makes clear that the executive viewed competing as a CLEC to be a poor long-term business proposition. See J.A. 42 (quoting same executive as stating that "I don't think it's a sustainable economic model"). The complaint nowhere alleges that entry as a CLEC would have been more profitable than other business opportunities available to petitioners. In fact, statements by the

same executive suggest that other business opportunities were more attractive to ILECs. J.A. 42 (noting that ILEC "Qwest does compete to provide data and long-distance service to large Chicago-based businesses").

In short, the assertions in the complaint that petitioners' parallel lack of entry into each others' markets was "anomalous in the absence of an agreement," J.A. 21 (¶ 40), are similar to the allegation this Court disregarded in *Papasan*. Like the assertion there of having been "deprived of a minimally adequate education," the assertions here may properly be disregarded because the complaint "allege[s] no actual facts in support of [the] assertion[s]." 478 U.S. at 286.

Indeed, as the district court concluded (Pet. App. 51a), the factual allegations contained in the complaint actually undermine the conclusions that the complaint attempts to draw from the alleged parallel lack of entry. Those allegations suggest that the prospect of entering the CLEC business in another ILEC's territory was unlikely to be a successful business opportunity. See J.A. 23-26 (¶ 47) (alleging a variety of ways in which ILECs impeded CLECs, including poor quality service, lack of access to operational support systems and unbundled elements on a non-discriminatory basis, undue delays in the provision of unbundled elements, failure to provide interconnections, refusals to sell services at just and reasonable rates, lack of connections to essential facilities, errors in ILEC billing of CLECs, and slow and inaccurate manual order processing). The district court properly relied on those factual allegations in rejecting the complaint's conclusory statements, because a complaint can plead too much as well as too little and must be judged by the facts actually alleged, not by facts that

could be assumed but are not alleged. See *Associated Gen. Contractors*, 459 U.S. at 526.

At bottom, the factual allegations set forth in the complaint amount to no more than a pleading of parallel conduct in an industry with a regulatory scheme that imposed similar requirements on the ILECs, which in turn made such parallel conduct particularly likely. Although the complaint seeks to infer an "agreement" from that otherwise innocuous conduct, it contains no factual allegations sufficient to create a reasonably grounded expectation that discovery will uncover evidence of such an agreement. *Dura Pharms.*, 544 U.S. at 347. Nor were the allegations sufficient to provide "fair notice" to petitioners of the basis of respondents' claim or the theory on which it was based, given the breadth and scope of the charged conspiracy. Accordingly, the district court correctly demanded more specificity before allowing this "potentially massive factual controversy to proceed." *Associated Gen. Contractors*, 459 U.S. at 528 n.17.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

THOMAS O. BARNETT
Assistant Attorney General

THOMAS G. HUNGAR
Deputy Solicitor General

DEANNE E. MAYNARD
Assistant to the Solicitor General

CATHERINE G. O'SULLIVAN
JAMES J. O'CONNELL, JR.
HILL B. WELLFORD
Attorneys

AUGUST 2006

788 B

(20)

No. 05-1126

FILED

OCT 13 2006

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

BELL ATLANTIC CORPORATION, *et al.*,
Petitioners,

v.

WILLIAM TWOMBLY, *et al.*, Individually
and on behalf of all others similarly situated
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit**

BRIEF OF THE AMERICAN ANTITRUST INSTITUTE IN SUPPORT OF RESPONDENTS

PARKER C. FOLSE, III *
IAN B. CROSBY
SUSMAN GODFREY L.L.P.
1201 Third Ave., Suite 3800
Seattle, WA 98101
(206) 516-3880

* Counsel of Record

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC – (202) 789-0096 – WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF *AMICUS CURIAE*	1
ARGUMENT	2
I. THE COURTS ARE NOT AWASH IN FRIVOLOUS ANTITRUST CONSPIRACY CLAIMS	3
A. There is No Evidence of Frivolous Antitrust Conspiracy Claims	3
B. Formal Models Do Not Predict Frivolous Antitrust Conspiracy Claims	4
C. The Framers of the Federal Rules Deliberately Chose Not to Address Frivolous Antitrust Claims Through Heightened Pleading	6
II. A HEIGHTENED PLEADING STANDARD IN ANTITRUST CONSPIRACY CASES WOULD UNDERMINE ESSENTIAL PRIVATE ANTITRUST ENFORCEMENT	7
A. Cartels Are Already Under-deterred	7
B. Particularized Pleading Will Further Undermine Deterrence	8
C. "Plus-Factor" Analysis on the Pleadings is Unworkable	11
D. Many Meritorious Private Suits Against Cartels Would Not Have Been Brought Under Heightened Pleading	13
CONCLUSION	15

TABLE OF AUTHORITIES

CASES	Page
Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143 (1987)	7
In re Brand Name Prescription Drugs Litig., 123 F.3d 599 (7th Cir. 1997)	12
In re Bulk Popcorn Antitrust Litig., 783 F. Supp. 2d 1194 (D. Minn. 1991)	15
Eastman Kodak Co. v. Image Tech. Svcs., 504 U.S. 451 (1992)	12, 13
Hamilton County Bd. of Comm'rs. v. National Football League, 2006 WL 314493 (S.D. Ohio 2006)	4
Helicopter Support Sys., Inc. v. Hughes Helicopter, Inc., 818 F.2d 1530 (11th Cir. 1987)	15
Instructional Sys. Dev. Corp. v. Aetna Cas. and Sur. Co., 817 F.2d 639 (10th Cir. 1987)	15
Interstate Circuit v. United States, 306 U.S. 208 (1939)	11
Leatherman v. Tarrant County Narcotics Intel. and Coord. Unit, 507 U.S. 163 (1993)	2
Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)	11, 12
Pease v. Jasper Wyman & Son (Pease I), 2002 WL 1974081 (Me. Super)	14, 15
Pease v. Jasper Wyman & Son (Pease II), 845 A.2d 552 (Me. 2004)	14
Perma Life Mufflers, Inc. v. International Parts Corp. 392 U.S. 134 (1981)	7
Radovich v. National Football League, 352 U.S. 445 (1957)	7
Rosenfielde v. Falcon Jet Corp., 701 F. Supp. 1053 (D.N.J. 1988)	15
Strobl v. New York Merc. Exch., 582 F. Supp. 770 (S.D.N.Y. 1984)	14

TABLE OF AUTHORITIES—Continued

	Page
Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002)	2
Twombly v. Bell Atlantic Corp., 314 F. Supp. 2d 174 (S.D.N.Y. 2003)	13
CONSTITUTIONAL AND STATUTORY PROVISIONS	
10 M.R.S.A. § 1101	14
15 U.S.C. § 16(a)	4
OTHER AUTHORITIES	
Judges' Opinions On Procedural Issues: A Survey Of State And Federal Trial Judges Who Spend At Least Half Their Time On General Civil Cases, 69 B.U. L. Rev. 731 (1989)	3
Report of the House Judiciary Committee on the Lawsuit Abuse Reduction Act of 2005, H.R. Rep. 109-123 (2005)	4
2 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (2d. ed. 2000)	8
Robert G. Bone, *Modeling Frivolous Suits*, 145 U. Pa. L. Rev. 519 (1997)	3, 5, 6
Peter G. Bryant & E. Woodrow Eckard, *Price Fixing: The Probability of Getting Caught*, 73 Rev. Econ. & Stat. 531 (1991)	9
Edward Cavanagh, *Pleading Rules in Antitrust Cases: A Return to Fact Pleading*, 21 Rev. Litig. 1 (2002)	4, 6
Charles E. Clark, *Pleading Under the Federal Rules*, 12 Wyo. L.J. 177 (1957)	6

TABLE OF AUTHORITIES—Continued

Page

Mark A. Cohen & David T. Scheffman, *The Antitrust Sentencing Guideline: Is the Punishment Worth the Cost?*, 27 Am. Crim. L. Rev. 331 (1989)..... 9

John M. Connor & Robert H. Lande, *How High Do Cartels Raise Prices: Implications for Optimal Cartel Fines*, 80 Tul. L. Rev. 513 (2005)..... 8, 9

John M. Connor, *The Great Global Vitamins Conspiracy: Sanctions and Deterrence* (AAI Working Paper No. 06-02, February 22, 2006), *available at* http://www.antitrustinstitute.org/recent2/485.pdf..... 9

Frank Easterbrook, *Detrebling Antitrust Damages*, 28 J.L. & Econ. 445 (1985)..... 8

Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, U.S. Department of Justice, Caught in the Act: Inside an International Cartel 2, *presented at* OECD Competition Committee Working Party No. 3, Public Prosecutors Program (October 18, 2005), *available at* http://www.usdoj.gov/atr/public/speeches/212266.pdf..... 10, 11

Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, U.S. Department of Justice, An Update of the Antitrust Division's Criminal Enforcement Program, Speech Before the ABA Section of Antitrust Law Cartel Enforcement Round Table (Nov. 16, 2005), *available* at http://www.usdoj.gov/atr/public/speeches/21324.pdf..... 10

TABLE OF AUTHORITIES—Continued

	Page
Herbert Hovenkamp, *The Antitrust Enterprise* (2005)	12
Robert H. Lande, *Five Myths About Antitrust Damages*, 40 U.S.F. L. Rev. 651 (2006)	8, 9
William H. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. Chi. L. Rev. 652 (1983)	9
Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & Econ. 365 (1970)	8
John A. Shapard, et al., Federal Judicial Center, *Report of a Survey Concerning Rule 11, Federal Rules of Civil Procedure* (1995)	3, 6
Thomas E. Willgang, *et al.*, Federal Judicial Center, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* (1996)	5

IN THE

Supreme Court of the United States

No. 05-1126

BELL ATLANTIC CORPORATION, *et al.*,
Petitioners,

v.

WILLIAM TWOMBLY, *et al.*, Individually
and on behalf of all others similarly situated
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit**

BRIEF OF THE AMERICAN ANTITRUST INSTITUTE IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST OF THE *AMICUS CURIAE* [1]

The American Antitrust Institute (AAI) is an independent, not-for-profit organization whose mission is to increase the role of competition and sustain the vitality of the antitrust laws. The directors of the AAI have authorized this filing. The Advisory Board of the AAI consists of more than 85

[1] The parties have consented to the submission of this brief; their letters of consent have been filed with the Clerk of this Court. No person or entity other than the *amicus* and its counsel made any monetary contribution to the preparation or submission of this brief. *Amicus* and its counsel have not been compensated for those efforts.

prominent lawyers, law professors, economists and business leaders (listed on the AAI web site: www.antitrustinstitute.org). The Advisory Board serves in a consultative capacity and their individual views may differ from the positions taken by AAI.

A decision that private Section 1 conspiracy complaints should be subject to unduly strict pleading requirements could seriously undermine a competitive economy and deny consumers the benefits of competition. Ensuring that well-settled principles of antitrust law remain applicable to private conspiracy claims is essential to vital antitrust enforcement.

ARGUMENT

Amicus Curiae the American Antitrust Institute respectfully submits that the heightened pleading standard in private antitrust conspiracy cases sought by Petitioners is not just a solution in search of a problem, but a bad solution chasing a problem that is more hypothetical than real. Far from alleging mere "parallel conduct" and a "bald assertion" of conspiracy, Pet. Br. at i, the underlying complaint in this case identifies a number of traditional "plus factors," such as motive, opportunity, and actions against self-interest, that are more than adequate to notify Petitioners of the nature of Respondents' case. The Court's unanimous opinions in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002), and *Leatherman v. Tarrant County Narcotics Intel. and Coord. Unit*, 507 U.S. 163, 168 (1993), make clear that an amendment to the Rules or enactment of Congress is necessary to require more in any type of case not enumerated in Rule 9(b) or other law. This is especially so when the familiar cry of "frivolous litigation" advanced in support of restriction lacks any demonstrated basis, but the restriction if enacted would prevent the assertion of favored, meritorious claims. The judgment of the court of appeals is consistent with the fundamental public policies of adjudicating suits on

the merits and encouraging private enforcement of the antitrust laws, and should be affirmed.

I. THE COURTS ARE NOT AWASH IN FRIVOLOUS ANTITRUST CONSPIRACY CLAIMS

Petitioners assert that heightened pleading is necessary to avoid "costly" and "burdensome" litigation, and to prevent "class-action harassment, or windfall settlements." Pet. Br. at 16, 17, 22 (quotations omitted). But Petitioners cite no evidence that unmeritorious antitrust conspiracy suits plague courts or defendants frequently or at all.

A. There is No Evidence of Frivolous Antitrust Conspiracy Claims

Researchers note little empirical support for the contention that frivolous litigation of any kind is a serious problem in the Federal Courts. *See, e.g.*, Robert G. Bone, *Modeling Frivolous Suits*, 145 U. Pa. L. Rev. 519, at 596 (1997) (noting the lack of "hard empirical evidence bearing on the nature or seriousness of the problem" of frivolous litigation). Surveys of judges and lawyers suggest the opposite. One Federal Judicial Center survey found that only 16% of judges considered "groundless litigation" to be a "large or very large problem" in the Federal Courts. *See* John Shapard, et al., Federal Judicial Center, *Report of a Survey Concerning Rule 11, Federal Rules of Civil Procedure* 3 (1995). Similarly, only 21% of Federal Judges surveyed in a Harris poll considered "the number of frivolous suits and frivolous defenses without merit" to be a "major cause" of delays in litigation. *See Judges' Opinions On Procedural Issues: A Survey Of State And Federal Trial Judges Who Spend At Least Half Their Time On General Civil Cases*, 69 B.U. L. Rev. 731, 734 (1989).

Anecdotal reports of abusive litigation conspicuously omit antitrust suits. Not one price-fixing case appears among the

many horribles on parade in the *Report of the House Judiciary Committee on the Lawsuit Abuse Reduction Act of 2005*, H.R. Rep. No. 109-123 (2005), for example.[2] In contrast to the Congressional findings that have accompanied reforms in specific areas such as securities litigation, there is an "absence of similar claims of widespread abuse in antitrust cases . . . ." Edward Cavanagh, *Pleading Rules in Antitrust Cases: A Return to Fact Pleading*, 21 Rev. Litig 1, 20 (2002).

B. Formal Models Do Not Predict Frivolous Antitrust Conspiracy Claims

Formal models do not predict that defendants will routinely settle unmeritorious antitrust conspiracy claims for nuisance value rather than bear the cost of discovery. In fact, they predict the opposite. In a typical cartel case that does not follow a government action,[3] only the defendant will know or have the means to discover at the outset with relative certainty whether it actually conspired. Moreover, the plaintiff usually cannot ascertain this fact through a reasonable pre-filing investigation.[4] In this circumstance, where only the defendant can usually know the merits of a potential claim

---

[2] The report identifies a single case involving an antitrust allegation among a barrage of other charges arising out of a county commissioner's supposed claim that a football team violated its stadium lease by failing to be competitive. *See* H.R. Rep. No. 109-123 at n.84. (In fact, the suit's essential allegation was that the team had misled taxpayers into funding a new stadium with false information about the team's finances and intention to spend new revenues on hiring better players. *See Hamilton County Bd. of Comm'rs. v. National Football League*, 2006 WL 314493, at *14-15. (S.D. Ohio 2006).) The case was ultimately dismissed on statute of limitation grounds. *See id.* at 20-21.

[3] Private suits following a government action are expressly favored and cannot be considered frivolous. *See, e.g.*, 15 U.S.C. § 16(a) (providing that final judgments in government proceedings constitute prima facie evidence of liability in private actions).

[4] See discussion *infra* Part II.B.

and pre-filing investigation costs are large (here practically infinite) relative to the cost of determining the merits through discovery, rational plaintiffs may file meritorious and unmeritorious claims alike, but rational defendants will not settle any unmeritorious claims, and will settle some meritorious claims for less than the plaintiff's damages, while needlessly litigating others to a verdict. *See* Bone, *supra*, at 555-56. The net result of this equilibrium is not a transfer of wealth from innocent defendants to abusive plaintiffs, but from meritorious plaintiffs to guilty defendants, all at unnecessary cost to the scarce resources of the courts. *See id.* at 561-62.

The cost to plaintiffs of litigating antitrust conspiracy claims further constrains the potential for meritless filings. For all that defendants must identify and produce voluminous documents, plaintiffs must copy, store, and review them. For all that defendants must produce witnesses for deposition in far-flung locations, plaintiffs must pay court reporters and videographers to record those depositions, and lawyers must travel to and take them. Plaintiffs must also hire expert economists to opine on the existence and amount of overcharges. Private plaintiffs in non-class cases must produce their own potentially voluminous documents and subject their own witnesses to deposition discovery. In class actions, counsel must bear the substantial cost of class certification proceedings in addition to the costs of discovery and trial.[5] Lawyers who bring and lose meritless suits also bear

---

[5] A study of four judicial districts by the Federal Judicial Center found that, excluding settlement-only class actions, the vast majority of cases with class allegations that settle do not settle until after class certification. *See* Thomas E. Willgang, et al., Federal Judicial Center, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* 179 tbl. 40 (1996).

reputational costs that may affect their ability to attract future clients or obtain future settlements.[6]

C. The Framers of the Federal Rules Deliberately Chose Not to Address Frivolous Antitrust Claims Through Heightened Pleading

Unable to justify heightened pleading on empirical or economic grounds, Petitioners contend that notice pleading in antitrust conspiracy cases is unfair. It is unjust, they claim, to subject defendants to "fishing expeditions" and "the expensive machinery of litigation" when plaintiffs do not already know all the facts necessary to establish liability. Pet. Br. at 26. But the framers of the Federal Rules expressly considered and declined to address these concerns with an exception to notice pleading for antitrust cases:

> Judge Charles Clark, the principal drafter of the Federal Rules, outlined the arguments in favor of special, more specific pleading standards for antitrust as being treble damages, and long and costly discovery and trials. In ultimately rejecting these arguments, he stated that "the intent . . . of the rules is to permit the claim to be stated in general terms."

Cavanagh, *supra*, at 15 (quoting Charles E. Clark, *Pleading Under the Federal Rules*, 12 Wyo. L.J. 177, 186-87 (1957)).[7]

Empirical evidence does not show that defendants are beset by vexatious cartel litigation. Anecdotal accounts do not

---

[6] "Lawyers usually have access to reputational information through professional publications and personal contacts, and they have a strong incentive to screen frivolous suits, at least in contingency fee cases." Bone, *supra*, at 541.

[7] More recently, Congress considered and failed to enact an amendment to Rule 11(b)(3) eliminating the provision allowing filing of factual contentions lacking evidentiary support that are likely to have support after discovery. *See* Shapard, *supra*, at 1.

report it. Theoretical models do not predict it. If it exists, the framers of notice pleading deliberately chose not to address it. Yet to prevent it, Petitioners advance a measure that, as the next Part shows, would threaten to eliminate the historic role of private enforcement of the antitrust laws against cartels.

II. A HEIGHTENED PLEADING STANDARD IN ANTITRUST CONSPIRACY CASES WOULD UNDERMINE ESSENTIAL PRIVATE ANTITRUST ENFORCEMENT

The Clayton Act is designed to "bring to bear the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed inadequate." *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 151 (1987). The Court has said that "the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws." *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1981). In recognition of this purpose, the Court has acknowledge that it "should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in [the antitrust] laws." *Radovich v. National Football League*, 352 U.S. 445, 454 (1957).

A. Cartels Are Already Under-deterred

The importance of private antitrust enforcement under the Clayton Act has not diminished over time despite the resources devoted to government enforcement and increased attention given by businesses to antitrust compliance. Indeed, cartel behavior remains massively under-deterred by government enforcement. A comprehensive study of detected cartel activity since the passage of the Sherman Act found average overcharges two to three times greater than the 10% United States Sentencing Guidelines presumption by every measure

in every period for every type of cartel. *See* John M. Connor & Robert H. Lande, *How High Do Cartels Raise Prices: Implications for Optimal Cartel Fines*, 80 Tul. L. Rev. 513, 560-61 (2005). While falling as a result of increased antitrust enforcement, cartel overcharges after 1990 have still averaged 25%. *Id.* Moreover, the overcharge in the majority of cases that involve the most successful cartels has averaged an astonishing 75%. *Id.* at 561. Even when doubled, the Sentencing Guidelines presumption produces fines that are typically less and often far less than the overcharges cartels impose.

The threat of liability in private suits only partially mitigates this inadequacy. Even trebling the damages awarded in private suits likely does not amount to more than single actual damages. *See* Robert H. Lande, *Five Myths About Antitrust Damages*, 40 U.S.F. L. Rev. 651, 652-57 (2006). Failure to account for the time-value of money,[8] allocative efficiency losses,[9] price-sheltering by nonparticipants,[10] and several other factors,[11] makes single damages available for recovery

---

[8] While pre-judgment interest is not available in antitrust cases, "[a] survey by Judge Posner found that the average cartel probably lasted for six to nine years, with an additional three to four year lag before judgment." Lande, *supra*, at 652 (citing Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & Econ. 365, 381 (1970)).

[9] Allocative efficiency losses include the foregone production of goods that would be sold at competitive prices. *See id.* at 653 n.7 (citing Frank Easterbrook, *Detrebling Antitrust Damages*, 28 J.L. & Econ. 445, 455 (1985) (finding that allocative efficiency losses were half as large as transfer effects)).

[10] Nonmembers and producers of partial substitutes may raise prices to meet those set by a successful cartel. *See id.* at 654-55 (citing 2 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* 384-85, ¶ 347 nn.3, 4 (2d. ed. 2000)).

[11] These are "(1) the effects of the Statute of Limitations, (2) the uncompensated plaintiffs' attorneys' fees and costs, (3) the uncompensated

in antitrust cases far smaller than likely actual harm. *See id.* Indeed, in most circumstances, government and private penalties combined are unlikely to exceed single damages. *See id.* at 660-61. In the case of the heavily prosecuted vitamins cartels of the 1990s, for example, total worldwide government and private financial penalties combined amounted to less than 34% of real overcharges. *See* John M. Connor, *The Great Global Vitamins Conspiracy: Sanctions and Deterrence* 72 tbl. 12A (AAI Working Paper No. 06-02, February 22, 2006), *available at* http://www.antitrustinstitute.org/recent2/485.pdf.

Existing sanctions thus fall short of optimal deterrence. An optimally deterrent fine should equal the net harm a cartel causes (including overcharges, deadweight losses, and enforcement costs) divided by the probability of detection and conviction. *See* William H. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. Chi. L. Rev. 652, 656-57 (1983). Detection rates will never be 100% and are probably no more than 10% to 30%.[12] Sanctions amounting to no more and often less than actual overcharges are necessarily suboptimal. Therefore, it should not be surprising that after more than a century of antitrust enforcement in the United States, each year brings new disclosures of naked price-fixing and other

---

value of plaintiffs' time spent pursuing the case, (4) the costs of the judicial system, and (5) the tax effects." *Id.* at 655 n.19.

[12] *See, e.g.*, Peter G. Bryant & E. Woodrow Eckard, *Price Fixing: The Probability of Getting Caught*, 73 Rev. Econ. & Stat. 531, 535 (1991) (estimating the probability that a price-fixing conspiracy will be prosecuted by federal authorities to be at most between 13 and 17 percent in a given year); Mark A. Cohen & David T. Scheffman, *The Antitrust Sentencing Guideline: Is the Punishment Worth the Costs?*, 27 Am. Crim. L. Rev. 331, 348 (1989) (arguing that the detection rate for antitrust crimes is probably no greater than one in three or four); Connor & Lande, *supra*, at 519 (citing former Assistant Attorney General for Antitrust Douglas Ginsburg's estimate that enforcers detected as few as 10% of cartels.).

forms of illegal cartel behavior.[13] Changes in the law that would undermine the effectiveness of private antitrust enforcement would further reduce deterrence and correspondingly enhance the expected rewards of cartel behavior.

B. Particularized Pleading Will Further Undermine Deterrence

Requiring plaintiffs to plead price-fixing claims with particularity would severely undermine if not essentially eliminate the possibility of private sanctions against cartels absent a prior government conviction. Modern cartels employ extreme measures to avoid detection:

> The conspirators have discussed the criminal nature of their agreements; they have discussed the need to avoid detection by antitrust enforcers in the United States and abroad; and they have gone to great lengths to cover-up their actions—such as using code names with one another, meeting in secret venues around the world, creating false "covers"—i.e. facially legal justifications—for their meetings, using home phone numbers to contact one another, and giving explicit instructions to destroy any evidence of the conspiracy.

Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, U.S. Department

---

[13] Speaking in late 2005, Deputy Assistant Attorney General Scott D. Hammond noted that more than 107 individuals had served prison sentences for cartel offenses since May 1999, including 18 sentenced to a total of 13,157 days in jail in FY 2005 alone; and nearly $3 billion in criminal fines had been levied since FY 1997, with over $338 million levied against 13 corporations and 20 individuals in FY 2005. *See* Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, U.S. Department of Justice, An Update of the Antitrust Division's Criminal Enforcement Program, Speech Before the ABA Section of Antitrust Law Cartel Enforcement Round Table (Nov. 16, 2005), *available* at http://www.usdoj.gov/atr/public/speeches/213247.pdf.

of Justice, Caught in the Act: Inside an International Cartel 2, *presented at* OECD Competition Committee Working Party No. 3, Public Prosecutors Program (October 18, 2005), *available at* http://www.usdoj.gov/atr/public/speeches/212266.pdf. Difficulty in detection is only exacerbated by the tendency of international cartels to move their meetings and communications abroad in the face of stepped-up U.S. enforcement. *See id.* at 4.

Even in the absence of such well-planned efforts to conceal, illegal horizontal conspiracies typically do not form in the full light of day, with the details of their inception open to public view. Although the government has available to it investigative tools that can sometimes uncover such details before the commencement of formal enforcement actions, private plaintiffs with only limited access to non-public information will almost never be able to bring suit independent of government action if required to allege the "when," "where," and "who" of conspiracy. Pet. Br. at 1.[14] Requiring that they do so would deal a near-fatal blow to private antitrust enforcement of even naked cartel behavior.

C. "Plus-Factor" Analysis on the Pleadings is Unworkable

Requiring alternatively that the allegations of a complaint "tend[] to exclude the possibility that the alleged conspirators acted independently," Pet. Br. at 24 (quotations omitted), applies a summary judgment standard to the pleadings, and misstates the standard at that. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), applied a heightened evidentiary standard on summary judgment when "the

---

[14] *Cf. Interstate Circuit v. United States*, 306 U.S. 208, 221 (1939) ("As is usual in cases of alleged unlawful agreements to restrain commerce, the government is without the aid of direct testimony that the distributors entered into any agreement with each other to impose the restrictions upon subsequent-run exhibitors.").

factual context render[ed] [the plaintiff's] claims implausible." *Id.* at 588. "However, *Matsushita* itself said very little about proof requirements when structural evidence indicates that the offense is quite plausible and would be profitable for the defendants." Herbert Hovenkamp, *The Antitrust Enterprise* 136 (2005). "Failure to account for the distinction between rational and irrational conspiracies has led several courts to dismiss conspiracy claims incorrectly." *Id.* at 134-35. When the determination whether the alleged conspiracy would be profitable for the defendants turns on inferences to be drawn from the evidence, summary judgment is improper. *See In Re Brand Name Prescription Drugs Litig.*, 123 F.3d 599, 614 (7th Cir. 1997) (Posner, J.).

Matsushita certainly did not endorse evaluating the plausibility of a plaintiff's claim in a vacuum. "The Court did not hold [in *Matsushita*] that if the moving party enunciates any economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment." *Eastman Kodak Co. v. Image Tech. Svcs.*, 504 U.S. 451, 468 (1992).

The Petitioners' attempt to bend the *Matsushita* summary judgment standard to motions to dismiss would inevitably involve courts in precisely the sort of abstract economic theorizing that the Court enjoined in *Kodak*. In *Kodak*, the Court declined to hold the defendant's activities procompetitive as a matter of law based on plausible but unsubstantiated theoretical justifications. *See id.* at 470-71. The plaintiffs had also advanced plausible reasons why the defendant's conduct could be anticompetitive given certain market conditions. *See id.* at 473. The Court concluded that it could not decide between these competing theories as a matter of law given the "sparse" record before it. *Id.* at 486. Yet in *Kodak*, the parties had the opportunity for at least limited discovery into the actual market conditions and other factors bearing on their competing theories. *See id.* at 459.

Plaintiffs responding to a motion to dismiss will have no such opportunity.

Even where, at the outset of litigation, as much is known publicly about the relevant market as in this case, courts risk undue speculation or summary adjudication of disputed facts in applying the "tends to exclude" test on the pleadings. The District Court here simply hypothesized that market incentives against entry by Petitioners in each other's territories counterbalanced the incentives toward entry that Respondents alleged. *See Twombly v. Bell Atlantic Corp.*, 314 F. Supp. 2d 174, 184-88 (S.D.N.Y. 2003). Then it posited an innocent explanation for a statement by an executive of the Petitioners, whom the Respondents had no opportunity to depose and cross examine, that on its face contradicted the court's theoretical conclusion that entry would not be profitable. *See id.* at 188.

As in Kodak, "there is no immutable physical law—no 'basic economic reality'" that compels either of these conclusions. *See Kodak*, 504 U.S. at 471. Whether it would in fact have been profitable for the defendants to enter each other's territories, and whether their explanation of their agents' public statements are credible, depend on facts yet to be established. The District Court's opinion below is an object lesson in the impracticability of "plus-factor" analysis on the pleadings even, and perhaps especially, in cases where many pertinent facts are publicly known.

D. Many Meritorious Private Suits Against Cartels Would Not Have Been Brought Under Heightened Pleading

Requiring particularized allegations of conspiracy or applying "plus-factor" analysis to pleadings would likely have prevented suit in a number of meritorious reported cases.

Facts that would not have been known to the plaintiff at the time of filing were crucial to establishing "plus factors" supporting a verdict entered against major potato processors for conspiring to fix the price of potato futures contracts in *Strobl v. New York Merc. Exch.*, 582 F. Supp. 770 (S.D.N.Y. 1984). The court cited numerous examples of parallel conduct that it deemed "unusual" in light of the cumulative weight of facts developed through discovery and trial. *Id.* at 775-76. The plaintiff rebutted the defendants' contention that their market positions could be understood as hedging strategies with evidence that the defendants' actual needs should have put them on the opposite side of the market. *Id.* at 777. Had the defendants posed this argument as a pure matter of economic theory on the pleadings, however, it is difficult to conceive how the plaintiff could have alleged facts in good faith to rebut it.

In *Pease v. Jasper Wyman & Son (Pease I)*, 2002 WL 1974081 (Me. Super.), a Maine jury returned an $18.68 million verdict against three blueberry-processing companies for participating in a price-fixing and non-solicitation conspiracy that lowered the price paid to growers. *See Pease v. Jasper Wyman & Son (Pease II)*, 845 A.2d 552, 554 (Me. 2004).[15] The plaintiffs had no direct evidence of conspiracy after discovery and relied on "plus factors" in opposing summary judgment. *See Pease I*, 2002 WL 1974081 at *9. The plaintiffs introduced deposition testimony and pointed out a failure to produce documents to show that the defendants had affirmatively declined to solicit each-others' customers. *Id.* at *15-16. In concluding that the defendants acted against their economic self-interest, the court relied on evidence that they needed more berries to fill excess

---

[15] The plaintiffs' claims arose under the Maine antitrust statute, 10 M.R.S.A. § 1101, which parallels and is interpreted according to federal case law on the Sherman Act. *Pease v. Jasper Wyman & Son (Pease I)*, 2002 WL 1974081, at *8 n.13.

processing capacity. *Id.* On the pleadings, presumably none of these facts could have been available to the plaintiffs to negative the defendants' innocent explanation that, equally plausibly, growers simply sold habitually to the same buyers out of loyalty. *See id.* at *6. The same is true respecting every other "plus factor" that the court found the plaintiffs had established in allowing their ultimately successful claims to go to a jury.

This pattern repeats through many cases in which plaintiffs have survived summary judgment on evidence of conspiracy or "plus factors" that they likely could not have alleged before obtaining discovery. *See, e.g., In Re Bulk Popcorn Antitrust Litig.*, 783 F. Supp. 2d 1194, 1196-97 (D. Minn. 1991) (evidence of communications among competitors regarding price and supplies and agreements to divide territory); *Instructional Sys. Dev. Corp. v. Aetna Cas. and Sur. Co.*, 817 F.2d 639, 645 (10th Cir. 1987) (letter from counsel for conspirator reminding co-conspirator of "special relationship"); *Helicopter Support Sys., Inc. v. Hughes Helicopter, Inc.*, 818 F.2d 1530, 1535 (11th Cir. 1987) (telex to defendant from distributor advising that "corrective action" had been taken regarding discounters); *Rosenfielde v. Falcon Jet Corp.*, 701 F. Supp. 1053, 1061 (D.N.J. 1988) ("The most probative evidence of a conspiracy to fix prices within the business jet industry is the reciprocal exchange of price information among the sales engineers of the various manufacturers, as evidenced by the Falcon Jet price list comparisons . . . and reams of deposition testimony.").

CONCLUSION

Requiring particularized allegations of conspiracy or "plus factors" that tend to exclude hypothetical justifications for plausibly concerted parallel conduct places an unwarranted burden on plaintiffs and courts. Private plaintiffs will rarely be in a position to make such allegations, and courts are not

equipped to evaluate them in the abstract. There is no reason to believe that courts or defendants are vexed by frivolous cartel allegations, and certainly no evidence that they are. Plaintiffs and their lawyers have every incentive to make such allegations judiciously rather than incur the massive cost of discovery and trial on claims of dubious merit. Requiring heightened pleading for claims of antitrust conspiracy threatens to chill litigation that benefits the public interest for little if any reciprocal benefit.

The existing "implausibility" standard and the strictures of Rule 11 are together sufficient to guard against abusive antitrust conspiracy suits and notify defendants of plaintiffs' claims. While a bare allegation of conspiracy may not be sufficient to satisfy a plaintiff's burden under Rule 8(a), a reasonably articulated statement of facts from which a conspiracy may be plausibly supposed certainly does. Petitioners' contention that the pleadings should also negative any theory of independent action that defendants might invent goes beyond the Rules, beyond precedent, and beyond reason. Amicus Curiae AAI respectfully submits that the judgment of the court of appeals should be AFFIRMED.

Respectfully Submitted,

PARKER C. FOLSE, III *
IAN B. CROSBY
SUSMAN GODFREY L.L.P.
1201 Third Ave., Suite 3800
Seattle, WA 98101
(206) 516-3880

* Counsel of Record

Counsel for Amicus Curiae

714A

Supreme Court, U.S.
FILED
AUG 25 2006
OFFICE OF THE CLERK

No. 05-1126

In the Supreme Court of the United States

BELL ATLANTIC CORPORATION, ET AL.
Petitioners,

v.

WILLIAM TWOMBLY, ET AL.
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PETITIONERS NOR RESPONDENTS

KAREN J. MATHIS, President*
AMERICAN BAR ASSOCIATION
321 North Clark Street
Chicago, IL 60610
(312) 988-5000

JOSEPH ANGLAND
ROXANN E. HENRY

*Counsel of Record

Counsel for Amicus Curiae,
American Bar Association

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. TO SURVIVE A MOTION TO DISMISS, A SECTION 1 SHERMAN ACT COMPLAINT MUST ALLEGE FACTS THAT PROVIDE A REASONABLE BASIS TO SHOW THAT THERE IS AN AGREEMENT 4

A. Allegations of Parallel Conduct Alone Do Not Adequately Plead the Element of Conspiracy 4

B. Rule 12(b)(6) Provides a Valuable Filter From Which Antitrust Cases Merit No Exemption 8

CONCLUSION 13

TABLE OF AUTHORITIES

CASES

Albrecht v. Herald Co.,
390 U.S. 145 (1968) 5

Associated General Contractors of California, Inc. v. California State Council of Carpenters,
459 U.S. 519 (1983) 5

Blue Chip Stamps v. Manor Drug Stores,
421 U.S 723 ..... 11, 12

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993) 6

Copperweld Corp. v. Independence Tube Corp.,
467 U.S. 752 (1984) 5

Fisher v. City of Berkeley,
475 U.S. 260 (1986) 5

Hoover v. Ronwin,
466 U.S. 558 (1984) 10

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 6

Monsanto Co. v. Spray-Rite Service Corp.,
465 U.S. 752 (1984) 6

Mullane v. Central Hanover Bank & Trust Co.,
339 U.S. 306 (1950) 4

Reiter v. Sonotone,
442 U.S. 330 (1979) 12

Rowe Entm't, Inc. v. William Morris Agency, Inc., 205 F.R.D. 421 (S.D.N.Y. 2002) 10

Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537 (1954) 5, 6

STATUTES AND RULES

Fed. R. Civ. P.:

Rule 1 11

Rule 8 4

Rule 12(b)(6) ..... passim

Rule 23 9

Rule 26(f)(2) 9

OTHER MATERIALS

ABA Judicial Division, *Report and Recommendation to the House of Delegates*, Report No. 100A (Aug. 1981) 2

ABA Section of Antitrust Law, *Antitrust Law Developments* p. 10 (5th ed. 2002) 6

ABA Section of Antitrust Law, *Report and Recommendation to the House of Delegates*, Report No. 307 (Aug. 2006) 2

6 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* (2d. ed. 2003) 6, 7

Jonathan B. Baker, *Identifying Horizontal Price Fixing in the Electronic Marketplace*, 65 Antitrust L.J. 41 (1996) 7

Roger D. Blair and Jill Boylston Herndon, *Inferring Collusion from Economic Evidence*, ANTITRUST, Summer 2001 7

Charles B. Casper, *The Class Action Fairness Act's Impact on Settlements*, ANTITRUST, Fall 2005 11

Edward D. Cavanaugh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 Tul. L. Rev. 777 (1987) 11

Deborah R. Hensler *et al.*, *Class Action Dilemmas: Pursuing Public Goals for Private Gain*, Rand Institute of Civil Justice 10 (2000) 10

Manual for Complex Litigation, Fourth 10

Robert A. Milne and Jack E. Pace III, *The Scope of Expert Testimony on the Subject of Conspiracy in a Sherman Act Case*, ANTITRUST, Spring 2003 6

2 James Wm. Moore, et al., Moore's *Federal Practice* (3d ed. 2006) 9

Recommendations of the American College of Trial Lawyers on Major Issues Affecting Complex Litigation, 90 F.R.D. 207 (1981) 10

Steven C. Salop and Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 Geo. L.J. 1001 (1986) 11

Linda Silberman, *The Vicissitudes of the American Class Action - With a Comparative Eye*, 7 Tul. J. Int'l & Comp. L. 201 (1999).....11

Edward A. Snyder and Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 Mich. L. Rev. 551 (1991).....11

Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655 (1962).....8

Gregory J. Werden, *Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law With Oligopoly Theory*, 71 Antitrust L.J. 719.....7

Samuel Williston, *A Treatise on the Law of Contracts*, (4th ed. 2004) 8

5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* (3d ed. 2004).....4, 9

INTEREST OF *AMICUS CURIAE*[1]

With more than 405,000 members, the American Bar Association ("ABA") is the world's largest voluntary professional membership organization and the leading organization of the legal profession in the United States.[2] Its members come from each of the fifty states, the District of Columbia, and the U.S. territories. Membership is voluntary and includes attorneys in private practice, government service, corporate law departments, and public interest organizations, as well as legislators, law professors, law students, and non-lawyer associates in related fields. ABA members represent the full spectrum of public and private litigants, including plaintiffs and defendants. Among the ABA entities is the Section of Antitrust Law, with over 9,000 members.

The question presented in this case is whether mere allegations of parallel conduct by competitors coupled with a bare bones allegation of conspiracy are sufficient to state the material element of conspiracy for purposes of a Section 1 Sherman Act claim. The ABA submits that the experience of courts and practitioners addressing claims arising under Section 1 of the Sherman Act warrants a negative answer.[3] The

---

[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have filed letters consenting to the filing of this brief with the Clerk of this Court.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

[3] The American Bar Association is addressing only the pleading standard articulated by the Second Circuit and takes no position on whether petitioners or respondents should prevail.

ABA's mission is, in part, to serve the public and the profession by promoting rule of law principles that – consistent with Congress's intent – harmonize the need to promote the adjudication of meritorious claims with the need to reduce delay and excessive costs in litigation. The ABA believes that Fed. R. Civ. P. 12(b)(6) requires dismissal of a complaint alleging a conspiracy in violation of Section 1 of the Sherman Act that fails to allege facts constituting more than mere parallel conduct.[4] Because the ABA represents a uniquely broad spectrum of the American legal community, we believe that our perspective on the central issue in this case may be helpful to this Court.

SUMMARY OF ARGUMENT

The Second Circuit articulated a standard that permits an allegation of the element of conspiracy under Section 1 of the Sherman Act to survive a motion to dismiss that undermines the requirement of Rule 12(b)(6) to state a claim upon which relief can be granted and conflicts with basic antitrust principles. The ABA urges this Court to reject the Second Circuit's rule that a pleading of facts indicating parallel conduct by the defendants suffices to state a claim of conspiracy

---

[4] The ABA House of Delegates has adopted a policy position "[e]ncourag[ing] all courts, court supervisory bodies, and state and local bar associations to take an active role in reducing delay and excessive costs in litigation." ABA Judicial Division, *Report and Recommendation to the House of Delegates*, Report No. 100A (Aug. 1981). The action of the House of Delegates adopting the report is at 106 ABA Reports 884 (1981). More specifically, the ABA House of Delegates has adopted a policy position "[u]rging that Fed. R. Civ. P. 12(b)(6) be interpreted to require that a complaint alleging a conspiracy in violation of Section 1 of the Sherman Act must allege facts constituting more than mere parallel conduct and ordinary business behavior." ABA Section of Antitrust Law, *Report and Recommendation to the House of Delegates*, Report No. 307 (Aug. 2006). The action of the House of Delegates adopting the report is at Daily Journal of the ABA House of Delegates (Aug. 8, 2006), p. 28 (available at http://www.abanet.org/leadership/2006/annual/home.html).

unless "there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence."[5] Instead, the experience of the courts and lawyers resolving antitrust disputes counsels that to survive a motion to dismiss, a Section 1 Sherman Act complaint must allege facts that provide a reasonable basis to believe that there is an agreement. Mere parallel conduct and invocation of the words "agreement" or "conspiracy" do not suffice as parallel conduct alone does not provide a reasonable basis to believe there is an agreement. Indeed, parallel but independent conduct is expected in a perfectly competitive market.

The standard articulated by the Second Circuit would impose sizeable costs on defendants and courts in situations in which there is no apparent reason to conclude that unlawful activity occurred. In addition, the risk of actions based solely on parallel conduct would impede businesses from operating in the most efficient manner by raising the cost and risk of unilateral conduct, and ironically would undermine pro-competitive decisions that parallel those of competitors. Moreover, as lawyers we see the need for rules of law that can be understood and applied by persons running a business. Without clear rules that differentiate between legal and illegal conduct, lawyers face difficulty adequately responding to clients seeking advice on how to operate in the marketplace. Nor is the permissive standard stated by the Second Circuit

---

[5] The Second Circuit stated: "The pleaded factual predicate must include conspiracy in the realm of 'plausible' possibilities in order to survive a motion to dismiss. *Nagler* suggests that a pleading of facts indicating parallel conduct by the defendants can suffice to state a plausible claim of conspiracy . . . . Thus, to rule that allegations of parallel anticompetitive conduct fail to support a plausible conspiracy claim, a court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence." *See* Pet. App. at 25a (citation omitted).

necessary to ensure that meritorious claims proceed beyond the pleading stage. To survive a Rule 12(b)(6) motion to dismiss, the antitrust laws and Federal Rules of Civil Procedure require a Section 1 Sherman Act complaint to allege something more than parallel conduct.

ARGUMENT

I. TO SURVIVE A MOTION TO DISMISS, A SECTION 1 SHERMAN ACT COMPLAINT MUST ALLEGE FACTS THAT PROVIDE A REASONABLE BASIS TO SHOW THAT THERE IS AN AGREEMENT

A. Allegations of Parallel Conduct Alone Do Not Adequately Plead the Element of Conspiracy

Rule 12(b)(6) tests the legal sufficiency of a complaint and requires that it state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). In all cases this requires a complaint to allege conduct in violation of law.[6] No different rule applies to antitrust claims. Thus, Section 1 of the Sherman Act requires pleading facts sufficient to allege "conspiracy" in a manner that shows the complainant is entitled to relief. Conclusory invocation of the word "conspiracy" is not sufficient.[7] Nor, the ABA submits,

---

[6] A complaint, at a minimum, must contain enough information from which each element of a claim for relief can be identified. *See* 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1228, at 321l (3d ed. 2004); *id.* at § 1216; Fed. R. Civ. P. 8. Only in this manner does notice pleading meet the constitutional dictates of due process by providing adequate notice to enable a meaningful opportunity to be heard. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

[7] *See Bell Atlantic Corp. v. Twombly*, Pet. App. at 16a. Moreover, this Court noted, in upholding dismissal under Rule 12(b)(6), that "[i]t is not ... proper to assume that the [plaintiff] can prove facts it has not alleged or that the defendants have violated the antitrust laws in ways that have

contrary to the articulated standard of the Second Circuit, does adding allegations of parallel conduct state grounds for showing that the complainant is entitled to relief.[8]

This Court's precedent recognizing the difficulty of distinguishing legal, unilateral conduct from illegal, collusive action informs the analysis of the factual predicate that must be alleged to state a claim. The distinction between unilateral conduct and conspiracy is of paramount significance to defining a claim under Section 1 of the Sherman Act because this law does not proscribe conduct that is "wholly unilateral." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (quoting *Albrecht v. Herald Co.*, 390 U.S. 145, 149 (1968)). Similarly, the Court has cautioned that the effects from unilateral and collective conduct may be indistinguishable. *See* 467 U.S. at 775 ("because the Sherman Act . . . prohibit[s] . . . only restraints effected by a contract, combination or conspiracy – it leaves untouched a single firm's anticompetitive conduct (short of threatened monopolization) that may be *indistinguishable in economic effect from the conduct of two firms* subject to § 1 liability.") (emphasis added); *Fisher v. City of Berkeley*, 475 U.S. 260, 266 (1986) ("[e]ven where a single firm's restraints directly affect prices and have the *same economic effect as concerted action might have*, there can be no liability under § 1 in the absence of an agreement.") (emphasis added).

Thus, this Court long has held that proof of "parallel business behavior" does not establish the element of conspiracy for purposes of Section 1 of the Sherman Act. *See Thea-*

---

not been alleged." *Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 526 (1983).

[8] As previously noted, the American Bar Association takes no view on the facts of the instant case.

tre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 541 (1954) ("[T]his Court has never held that proof of parallel business behavior conclusively establishes agreement"); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993) ("conscious parallelism, ... [is] not in itself unlawful."). *See also* ABA Section of Antitrust Law, *Antitrust Law Developments* p. 10 (5th ed. 2002) ("Based on these Supreme Court decisions, lower courts have consistently held that conscious parallelism, by itself, will not support a finding of concerted action.").

The insufficiency of parallel conduct as a basis for an antitrust claim, even when such conduct is consciously interdependent, is premised on sound economic theory and business reality.[9] As the Court observed in *Brooke Group Ltd.*, "conscious parallelism, ... [is] not in itself unlawful, [even though, the] firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supra-competitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions." 509 U.S. at 227; *c.f., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 593 (1986); (the inference of conspiracy must be reasonable in light of the competing inferences of independent action or collusive action); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984) (to prove conspiracy requires facts that "tend[s] to exclude the possibility of independent action by the parties."); Robert A. Milne and Jack E. Pace III, *The Scope of Expert Testimony on the Subject of Conspiracy in a Sherman Act Case*, Antitrust, Spring 2003 at 36 ("tacit collusion amounting to mere 'conscious parallelism' without actual agreement, is not prohibited under Sec-

---

[9] *See also* 6 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* § 1405a, at 21 (2d. ed. 2003) ("[p]roblematically, parallel conduct is often forced by circumstance: under such circumstances a 'rational' profit-maximizing firm will always act in a way that is similar to its rivals.").

tion 1 of the Sherman Act . . ."); Roger D. Blair and Jill Boylston Herndon, *Inferring Collusion from Economic Evidence*, Antitrust, Summer 2001 at 17 ("In the antitrust literature, tacit collusion is sometimes referred to as conscious parallelism. Since the case law indicates that proof of an *actual agreement* is a necessary predicate for a Section 1 violation and since there is no agreement, as that term is defined, there can be no successful antitrust prosecution of tacit collusion."); Jonathan B. Baker, *Identifying Horizontal Price Fixing in the Electronic Marketplace*, 65 Antitrust L.J. 41, 47-48 (1996) (noting that judicial practice has based findings of agreement "on the totality of circumstantial evidence that the parties have done more than merely watch each other's market behavior and respond to it independently, as leaders and followers. . . . [A]greement does not describe a result or equilibrium, but one particular process of reaching supracompetitive marketplace outcomes – what may be termed the 'forbidden process' of negotiation and exchange of assurances. The forbidden process consists of behavior that can be enjoined. Thus, if oligopoly reaches a high price equilibrium through the forbidden process that the law calls an agreement, Sherman Act Section 1 has been violated. If the same result were reached through leader-follower behavior, no agreement on price will be found.")

Parallel business behavior often is a sign of an efficient market and is extremely common. "Mere parallelism . . . is widely present, especially in perfectly competitive markets and is not itself a compelling subject for legal control." 6 Areeda & Hovenkamp ¶ 1417(g), at 115. Parallel business behavior does not suggest collusion. Rather, "it is important to recognize that similar simultaneous actions merely reflect independent responses to common business problems." *Id.* ¶ 1425, at 172; *see also* Gregory J. Werden, *Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law With Oligopoly Theory*, 71 Antitrust L.J. 719, 779 (2004) ("Something more than interdependence must be

shown before agreement can be inferred. Interdependence is normal and innocent in oligopoly. Rational oligopolists typically monitor rivals closely and react to their price changes or other strategic moves. There is nothing even remotely suspicious about such actions."); Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 658 (1962) ("The point is that conscious parallelism is never meaningful by itself, but always assumes whatever significance it might have from additional facts.").

B. Rule 12(b)(6) Provides a Valuable Filter From Which Antitrust Cases Merit No Exemption

The ABA supports fully applying Rule 12(b)(6) to permit actions that present meritorious claims to proceed while speedily dismissing those that do not. The Rule strikes a balance between competing policy concerns. On the one hand, to survive a motion to dismiss, plaintiffs are not required to provide a detailed factual underpinning for their claims. This has particular salience when the best evidence of the validity of the claim likely lies in the hands of the defendants, as is often the case with antitrust conspiracy allegations. On the other hand, the allegations must identify a violation of law – something that is illegal, which parallel conduct is not.

Proper application of Rule 12(b)(6) in the antitrust context thus requires no more than in other cases. As an allegation of breach of contract must provide a factual predicate to identify the contract and breach,[10] an allegation of antitrust

---

[10] *See generally* forms outlining the factual predicates to allege claims for damages for breach of contract set forth in Williston, *A Treatise on the Law of Contracts* (4th ed. 2004) §§ 64F-71F. Absent references to a written, executed agreement, the factual predicates outlined provide clear notice of the alleged offer, acceptance and terms of the agreement. For example, "on or about _____, at the request of defendant, plaintiff

conspiracy must provide a factual predicate that provides a reasonable basis to believe there is an agreement. *Cf.* 5 *Federal Practice and Procedure*, § 1228, at 317-18 ("Thus, it should now be settled that there is no heightened pleading standard in antitrust cases. On the other hand, the complexity of most antitrust cases inevitably leads to lengthier and more detailed pleadings"); 2 James Wm. Moore, et al., *Moore's Federal Practice* § 8.04[1][a], at 8-24.1 (3d ed. 2006) ("Whether a statement of claim is sufficient to give fair notice depends in part on the complexity of the case."). Rejecting the Second Circuit's permissive standard would not unduly deter meritorious cases. Substantive antitrust law makes clear that a conspiracy can be proven by direct or indirect evidence, and allegations based on either could provide the reasonable basis that the ABA believes should underlie a complaint.

The courts, lawyers, and scholars have observed various aspects of antitrust litigation that reinforce the propriety of applying the principles of Rule 12(b)(6) to dismiss antitrust claims that do not provide a reasonable basis to believe there is an agreement. Plaintiffs who bring claims for antitrust violations generally require substantial resources from courts and opposing parties, including obtaining broad discovery and presenting often complex issues for pretrial management.[11] This discovery process is often unavoidable because

---

agreed to _____ [*set forth acts or duties whose performance was promised by plaintiff*]." *Id.* at § 64F:16

[11] Antitrust claims that pass the filter of Rule 12(b)(6) typically proceed to scheduling and a discovery plan pursuant to Rule 26(f), which invariably involves reference to the complaint to determine "the subjects on which discovery may be needed." Fed. R. Civ. P. 26(f)(2). Discovery proceeds only after a party has pled that it is entitled to relief and the pleadings control the direction of the discovery plan. Rule 23 directives with regard to class action practice, which often apply in antitrust cases, similarly command a focused evaluation of the complaint. Fed. R. Civ. P. 23 looks to the complaint allegations on issues regarding whether

it may furnish the proof needed to prevail. As noted in the Manual for Complex Litigation: "Antitrust litigation can ... involve voluminous documentary and testimonial evidence, extensive discovery, complicated legal, factual, and technical (particularly economic) questions, numerous parties and attorneys, and substantial sums of money, calling for the application of techniques and procedures for the management of complex litigation." Manual for Complex Litigation, Fourth, § 30, at 519 (2004); *id.* at n. 1730 (noting that many of the practices and procedures discussed in the manual were initially developed in antitrust litigation).

Lawyers regularly find that antitrust cases cost millions of dollars simply to litigate to the summary judgment phase and require an enormous time commitment from counsel, clients, and the courts. *Hoover v. Ronwin,* 466 U.S. 558, 580 n. 34 (1984) (when a complex antitrust case proceeds past the pleading stage, a defendant must "bear [a] substantial 'discovery and litigation' burden."); *c.f.* Deborah R. Hensler, Bonnie Dombey-Moore, Beth Giddens, Jennifer Gross, Erik K. Moller, Nicholas M. Pace, *Class Action Dilemmas: Pursuing Public Goals for Private Gain,* Rand Institute of Civil Justice 10, 31 (2000).[12]

Because discovery can be so daunting and expensive in antitrust class actions, these cases can assume substantial set-

---

questions of fact are common to the class, whether the claims and defenses of the representatives are typical, and whether common questions predominate, and in defining any claims, issues or defenses certified.

[12] *See al Rowe Entm't, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 424-425 (S.D.N.Y. 2002) (estimating that costs of producing electronic discovery – just a sliver of the discovery pie would run nearly $10 million); *Recommendations of the American College of Trial Lawyers on Major Issues Affecting Complex Litigation*, 90 F.R.D. 207 (1981).

tlement value as soon as they get past the 12(b)(6) stage[13] Linda Silberman, *The Vicissitudes of the American Class Action – With a Comparative Eye*, 7 Tul. J. Int'l & Comp. L. 201, 205 (1999). Lawyers experience great pressure to advise their clients to settle even flimsy antitrust cases that proceed past the pleading stage. Charles B. Casper, *The Class Action Fairness Act's Impact on Settlements*, ABA Antitrust, Fall 2005, Vol. 5, No. 1 at 26 ("the strong inducement to settle class actions – even those presenting weak claims on the merits – may give rise to some abuses"); Steven C. Salop and Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 Geo. L.J. 1001, 1011 (1986). A lack of adequate threshold requirements for proceeding to summary judgment thus not only may waste substantial resources but may create unfortunate incentives for parties to bring speculative claims with the expectation of achieving a settlement prior to the summary judgment stage. Indeed, the Second Circuit also acknowledged how these factors boost the nuisance value of antitrust cases. *See* Pet. App. at 30a.

This Court has recognized that the deterrence of nuisance suits is a legitimate concern at the pleading stage, *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975).[14] In

---

[13] While important to deterring anticompetitive conduct, in antitrust cases under the Sherman Act the availability of treble damages heightens the potential for settlements that otherwise would be unjustified. Edward D. Cavanaugh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 Tul. L. Rev. 777, 809 (1987) ("[t]he lure of treble damages may encourage the filing of baseless suits which otherwise might not have been filed."); *see also* Edward A. Snyder and Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 Mich. L. Rev. 551, 551-603 (1991) (private antitrust enforcement efforts currently encompass many claims that appear to be frivolous).

[14] *See also* Fed. R. Civ. P. Rule 1 (The rules are to "be construed and administered to secure the just, speedy, and inexpensive determination of every action.")

Blue Chip Stamps, which involved a class action under Securities and Exchange Commission Rule 10b-5, this Court noted that "[t]he potential for abuse of the liberal discovery provisions of the Federal Rules of Civil Procedure may . . . exist . . . to a greater extent than they do in other litigation. [In these cases], the mere existence of an unresolved lawsuit has settlement value to the plaintiff, not only because of the possibility that he may prevail on the merits, an entirely legitimate component of settlement value, but because of the threat of extensive discovery and disruption of normal business activities which may accompany a lawsuit which is groundless in any event, but cannot be proved so before trial." *Id.* at 742-43.

The attributes of antitrust litigation under the Sherman Act reinforce the important role that Rule 12(b)(6) plays in weeding out unmeritorious antitrust claims. *Reiter v. Sonotone*, 442 U.S. 330, 345 (1979) (noting that courts need to "exercise sound discretion and use the tools available" to dismiss baseless antitrust claims.) The Second Circuit's pleading standard, however, undermines Rule 12(b)(6) in Section 1 Sherman Act cases – a result that is inconsistent with the antitrust laws and not warranted by the Federal Rules of Civil Procedure. To survive a motion to dismiss, a complaint must allege facts that show that there is an agreement.

CONCLUSION

For the reasons stated, the ABA respectfully requests that this Court reaffirm that allegations of parallel business behavior are not sufficient to set forth the element of conspiracy under Section 1 of the Sherman Act necessary to survive a motion to dismiss under Rule 12(b)(6).

Respectfully submitted,

KAREN J. MATHIS, President*
AMERICAN BAR ASSOCIATION
321 North Clark Street
Chicago, IL 60610
(312) 988-5000

JOSEPH ANGLAND
ROXANN E. HENRY

* Counsel of Record

Counsel for Amicus Curiae, American Bar Association

August 25, 2006

627

Supreme Court, U.S.
FILED
AUG 25 2006
OFFICE OF THE CLERK

No. 05-1126

IN THE

Supreme Court of the United States

BELL ATLANTIC CORPORATION, *ET AL.*,

Petitioners,

v.

WILLIAM TWOMBLY, *ET AL.*, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF THE AMERICAN PETROLEUM INSTITUTE AS AMICUS CURIAE SUPPORTING PETITIONERS

Harry M. Ng
Douglas W. Morris
American Petroleum Institute
1220 L Street, N.W.
Washington, D.C. 20005
(202) 682-8000

Robert A. Long
Counsel of Record
James R. Dean, Jr.
Theodore P. Metzler
Covington & Burling LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004-2401
(202) 662-6000

Counsel for Amicus Curiae

August 2006

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. Parallel Business Conduct Is Extremely Common, Almost Always Results From Competition Rather Than Collusion, And Thus Is Not A Sufficient Basis For Finding A Conspiracy In Restraint Of Trade. 5

II. The Second Circuit's Decision Creates Perverse Litigation Incentives and Economic Outcomes. 6

A. Discovery In Civil Antitrust Cases Is Extremely Expensive And Discovery Costs Fall Primarily On Defendants. 7

B. The Second Circuit's Standard Encourages Meritless Litigation and Imposes Unjustified Costs On Consumers. 10

III. Private Antitrust Suits Are An Inefficient Means For Discovering Horizontal Antitrust Conspiracies. 11

A. Private Antitrust Suits Alleging Horizontal Antitrust Conspiracies Usually Follow Investigations By The Federal Government 12

B. Allowing Suits Based On Observed Parallel Conduct Would Discourage Rational Economic Decisionmaking 13

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

Page(s)

Asahi Glass Co. v. *Pentech Pharms., Inc.*, 289 F. Supp. 2d 986 (N.D. Ill. 2003) 8
Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975) 11
Brooke Group Ltd. v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) 5, 6
In re: Brand Name Prescription Drugs Antitrust Litig., 1995 U.S. Dist. LEXIS 8281 (N.D. Ill. June 13, 1995) 9
Maio v. *Aetna Inc.*, 221 F.3d 472 (3d Cir. 2000) 4
Lupia v. *Stella D'Oro Biscuit Co.*, 586 F.2d 1163 (7th Cir. 1978) 7
McCleneghan v. *Union Stock Yards Co.*, 298 F.2d 659 (8th Cir, 1962) 4
Northrop Corp. v. *McDonnell Douglas Corp.*, 751 F.2d 395 (D.C. Cir. 1984) 7
Papasan v. *Allain*, 478 U.S. 265 (1986) 4
Rowe Entm't, Inc. v. *William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y. 2002) 8
State Oil Co. v. *Khan*, 522 U.S. 3 (1997) 2
Texaco Inc. v. *Dagher*, 126 S. Ct. 1276 (2006) 2
Texaco Inc. v. *Hasbrouck*, 496 U.S. 543 (1990) 2
Theatre Enterprises, Inc. v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 541 (1954) 2, 5
United States v. *Topco Assocs.*, 405 U.S. 596 (1972) 12
Volvo Trucks North America, Inc. v. *Reeder-Simco GMC, Inc.*, 126 S. Ct. 860 (2006) 2
York v. *Ass'n of the Bar*, 286 F.3d 122 (2d Cir. 2002) 4

STATUTES

15 U.S.C. § 1 1
Pub. L. No. 108-37, 118 Stat. 665 (2004) 12

OTHER

John C. Coffee, Jr., Rescuing the Private Attorney General: Why the Model of Lawyer as Bounty Hunter Is Not Working, 42 Md. L. Rev. 215 (1983) 11
Robert D. Cooter & Daniel L. Rubinfeld, Reforming the New Discovery Rules, 84 Geo. L. J. 61 (1995-96) 9
Frank H. Easterbrook, Discovery as Abuse, 69 B.U. L. Rev. 635 (1989) 9
Corinne L. Giacobbe, Allocating Discovery Costs in the Computer Age: Deciding Who Should Bear the Costs of Discovery of Electronically Stored Data, 57 Wash. & Lee L. Rev. 257 (2000) 7, 8, 10
Jonathan T. Molot, How U.S. Procedure Skews Tort Law Incentives, 73 Ind. L.J. 59, 74 (1997) 10
Donald F. Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv. L. Rev. 655 (1962) 5
William H. Wagener, Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation, 78 N.Y.U. L. Rev. 1887 (2003) 8, 9, 10
Memorandum from Hon. Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to Hon. Anthony J. Scirica, Chair, Committee on Rule of Practice & Procedure (May 11, 1999) 8-9

Scott D. Hammond, speech before the ABA Section of Antirust Law Cartel Enforcement Roundtable: An Update of the Antitrust Division's Criminal Enforcement Program (November 16, 2005), ... 12
Scott D. Hammond, presentation by to the OECD Competition Committee, Paris, France: Cracking Cartels With Leniency Programs (October 18, 2005). 12

INTEREST OF AMICUS CURIAE[1]

The American Petroleum Institute ("API"), a non-profit District of Columbia corporation, is a national trade association for the U.S. oil and natural gas industry. API's more than 400 members cover all facets of the industry, including exploration, production, transportation, refining, and marketing.

This case presents an important question of antitrust law: Whether an allegation that competitors have engaged in parallel conduct, combined with a conclusory allegation that the parallel conduct is the result of a conspiracy to restrain trade, is sufficient to defeat a motion to dismiss an antitrust claim under Section 1 of the Sherman Act, 15 U.S.C. § 1. Parallel business conduct is extremely common and usually results from independent decisionmaking by competitors pursuing their own economic interests. Accordingly, parallel conduct does not itself violate the antitrust laws, and evidence of parallel conduct is not by itself sufficient to show a contract, combination, or conspiracy in violation of Section 1 of the Sherman Act. Under the court of appeals' decision in this case, however, antitrust plaintiffs can defeat a motion to dismiss a claim under Section 1 of the Sherman Act—and subject the defendants to costly, burdensome, and protracted discovery—by combining allegations of parallel conduct with a conclusory allegation of a conspiracy in restraint of trade. Because API's members may be subjected to such suits, they have a strong interest in the standard that applies in cases

---

[1] Letters from Petitioners and Respondents consenting to the filing of amicus briefs are on file with the Clerk. Pursuant to this Court's Rule 37.6, API states that no counsel for any party authored this brief in whole or in part. Nor did any person or entity, other than API, make a monetary contribution to the preparation or submission of this brief.

alleging that parallel business conduct states an antitrust claim.

API frequently participates in legislative, administrative, and judicial proceedings that present issues of national concern, including issues involving interpretation of the antitrust laws. API participated as *amicus curiae* at the petition stage in this case, and in other antitrust cases in this Court, including *Texaco Inc.* v. *Dagher*, 126 S. Ct. 1276 (2006); *Volvo Trucks N. Am., Inc.* v. *Reeder-Simco GMC, Inc.*, 126 S. Ct. 860 (2006), *State Oil Co.* v. *Khan*, 522 U.S. 3 (1997), and *Texaco Inc.* v. *Hasbrouck*, 496 U.S. 543 (1990). API believes that its participation as *amicus curiae* in this case will offer the Court an industry-wide perspective on the question presented.

SUMMARY OF ARGUMENT

1. This Court has recognized that parallel business conduct, standing alone, does not violate the antitrust laws. *See Theatre Enters., Inc.* v. *Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954). Parallel conduct usually results from independent decisionmaking by competitors facing similar conditions. The oil industry, like virtually every other industry, provides numerous examples of parallel conduct arising from independent action rather than agreement. Consequently, allegations of parallel business conduct, without more, are not sufficient to state a claim under Section 1 of the Sherman Act. That conclusion does not change if the allegations of parallel conduct are coupled with a conclusory allegation of conspiracy.

2. The court of appeals' decision creates perverse litigation incentives. Under the Second Circuit's standard, a complaint alleging a contract, combination or conspiracy in restraint of trade will survive a motion to dismiss so long as the plaintiff's complaint couples allegations of parallel business conduct by competitors

with a conclusory allegation of conspiracy. Denial of a motion to dismiss the complaint entitles the plaintiffs to obtain discovery. Discovery in antitrust cases is often massive, and the burden and expense of discovery falls disproportionately on defendants. As a result, defendants have an incentive to settle even meritless antitrust claims in order to avoid huge discovery costs. This, in turn, encourages plaintiffs and their counsel to file speculative antitrust complaints, and to maximize defendants' discovery burdens in order to extract a settlement. The costs of this antitrust litigation ultimately are borne by consumers and society at large.

3. Experience has shown that private antitrust actions are not a notably effective method of discovering horizontal agreements in violation of Section 1 of the Sherman Act. Most horizontal conspiracies are uncovered by antitrust enforcement agencies, employing tools such as civil investigative demands and grand juries, rather than private antitrust actions. Given the availability of other more effective means of discovering horizontal conspiracies, there is no need to "condemn defendants to potentially limitless 'fishing expeditions'—discovery pursued just 'in case anything turns up'—in hopes, perhaps, of a favorable settlement in any event." Pet. App. 27a (notes omitted). Moreover, if parallel business conduct subjects firms to costly discovery in private antitrust litigation, firms may avoid parallel conduct even when it makes economic sense and furthers consumers' interests. Ironically, actual conspirators are better positioned to avoid the appearance of parallel conduct than the vast majority of firms that are not conspirators and so do not know in advance what their competitors will do.

ARGUMENT

This case presents the question whether an antitrust plaintiff states a claim under Section 1 of the Sherman Act by coupling allegations that competitors have engaged in parallel conduct with a conclusory allegation that the conduct resulted from a conspiracy in restraint of trade. The complaint in this case alleges that the Petitioner telephone companies engaged in parallel conduct by (i) resisting the entry of competing companies (Competing Local Exchange Carriers or "CLECs") into their geographic markets, and (ii) failing to enter one another's geographic markets. As the district court explained, this parallel behavior could very well have resulted from independent action rather than collusion. Although the complaint included a conclusory allegation that the defendants agreed to restrain trade in violation of Section 1 of the Sherman Act, it made no supporting factual allegations that, if accepted as true, would support a finding of liability under Section 1.

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) will be granted if the allegations of the complaint, and all reasonable inferences based on the allegations, will not support a finding of liability. *E.g.*, *Papasan* v. *Allain*, 478 U.S. 265, 283 (1986); *York* v. *Ass'n of the Bar*, 286 F.3d 122, 125 (2d Cir. 2002); *Maio* v. *Aetna Inc.*, 221 F.3d 472, 481-82 (3d Cir. 2000). "[A] general allegation of conspiracy, without a statement of the facts constituting that conspiracy, is only an allegation of a legal conclusion and is insufficient to constitute a cause of action." *McCleneghan* v. *Union Stock Yards Co.*, 298 F.2d 659, 663 (8th Cir. 1962) (Blackmun, J.). Applying this basic rule, the district court correctly dismissed the complaint in this case. The Second Circuit was incorrect to hold that adding a conclusory allegation of conspiracy to an otherwise innocuous description of parallel conduct creates a claim upon which treble damages may be granted under the Sherman Act. The Second Circuit's

decision distorts antitrust doctrine and promotes costly and unnecessary litigation of claims that should not proceed past the pleading stage.

I. Parallel Business Conduct Is Extremely Common, Almost Always Results From Competition Rather Than Collusion, And Thus Is Not A Sufficient Basis For Finding A Conspiracy In Restraint Of Trade.

The Court has held that parallel business conduct, standing alone, does not violate the antitrust laws. *Theatre Enters., Inc.* v. *Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954); *see also Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993) ("[C]onscious parallelism" is "not in itself unlawful."). This antitrust principle is supported by antitrust scholars and economists, who agree that parallel behavior by competitors in a market is most often the result of common reaction to common market factors, and not anticompetitive collusion. *See, e.g.*, Donald F. Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv. L. Rev. 655 (1962). "[C]onscious parallelism is never meaningful by itself, but always assumes whatever significance it might have from additional facts." *Id.* at 658. "Even the fact that competitors have knowingly charged identical prices is a neutral fact in the absence of evidence which would lead one to expect that the prices would have been different if truly independent decisions had been made." *Id.* at 659.

Parallel conduct frequently results from independent action rather than collusion. For example, on a rainy day many pedestrians carry open umbrellas. The pedestrians behave in the same way, but their parallel behavior results from independent decisions about whether and how to keep dry, not an agreement to carry umbrellas. Gasoline stations, like virtually every other business, provide similar examples of parallel

conduct that results from independent decisions rather than agreement. Two or more gasoline stations may be located close together, but this pattern of proximity results from companies' independent evaluation and selection of available sites based on considerations such as traffic volume, access roads, real estate prices, and zoning restrictions. Similarly, many gasoline stations place a roof over the gasoline pumps, but this form of parallel conduct no more results from agreement than pedestrians' independent decisions to carry an umbrella. There are other examples of parallel conduct by gasoline stations: gasoline stations often are brightly lighted, sell soft drinks and snacks, and display prices on large signs that can be read from the road. This does not mean that companies have agreed with each other to install bright lights, sell snacks or post signs. Instead, companies facing similar business conditions make similar but non-collusive decisions.[2]

II. The Second Circuit's Decision Creates Perverse Litigation Incentives and Economic Outcomes.

The Second Circuit recognized that, in holding allegations of parallel conduct combined with a conclusory allegation of conspiracy sufficient to state a claim under Section 1 of the Sherman Act, it may "condemn defendants to potentially limitless 'fishing expeditions'—discovery pursued just 'in case anything turns up'—in

---

[2] In some circumstances a firm may take the actions of its competitors into account in making business decisions, but this is not of itself unlawful collusion. For example, in deciding whether to install an air pump to inflate tires, a gasoline station might consider whether other nearby stations provide an air pump. This type of consideration frequently benefits consumers and does not amount to collusion in violation of the antitrust laws. *See Brooke Group*, 509 U.S. at 227 ("[C]onscious parallelism" is "not in itself unlawful.").

hopes, perhaps, of a favorable settlement in any event." Pet. App. 27a (notes omitted). Antitrust discovery is very expensive, and its substantial costs are borne largely by defendants and their customers. Faced with the prospect of such costs, defendants may agree to settle even meritless cases to avoid the costs of discovery. This effectively rewards plaintiffs and their counsel for bringing meritless antitrust actions, and encourages the filing of more such actions. The result is to impose unwarranted costs on consumers and society at large.

A. Discovery In Civil Antitrust Cases Is Extremely Expensive And Discovery Costs Fall Primarily On Defendants.

"[T]he statutory private antitrust remedy of treble damages affords a special temptation for the institution of vexatious litigation." *Lupia* v. *Stella D'Oro Biscuit Co.*, 586 F.2d 1163, 1167 (7th Cir. 1978). An antitrust class action alleging conspiracy based on observed parallel conduct of the defendant is a particularly tempting target for vexatious litigation. Under the Second Circuit's decision, plaintiffs' attorneys need no factual basis to believe that any conspiracy has occurred in order to state a cognizable claim for a violation of the Sherman Act. Instead, it is sufficient to identify any parallel conduct by two competitors and assert in conclusory fashion that conspiracy is "among the realm of plausible possibilities." Pet. App. 19a.

Once an antitrust action is filed, plaintiffs generally are in a position to demand massive amounts of discovery from defendants. "Massive discovery requests are unfortunately now part of the standard tactical maneuvering of parties immersed in the adversarial process." *Northrop Corp.* v. *McDonnell Douglas Corp.*, 751 F.2d 395, 407 (D.C. Cir. 1984). In complex cases, document discovery alone regularly involves collecting, reviewing, and producing huge numbers of documents, at enormous expense. *See* Corinne L. Giacobbe, Allocating

Discovery Costs in the Computer Age: Deciding Who Should Bear the Costs of Discovery of Electronically Stored Data, 57 Wash. & Lee L. Rev. 257 (2000). The costs of discovery are particularly high in civil antitrust cases. William H. Wagener, Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation, 78 N.Y.U. L. Rev. 1887, 1898-99 (2003) ("[C]ourts typically permit antitrust discovery to range further (and costs to run higher) than in most other cases."). *See also Asahi Glass Co.* v. *Pentech Pharms., Inc.*, 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003) (Posner, J., sitting by designation) (Antitrust discovery is "inevitably costly and protracted.").

The ubiquity of computers and electronic communications has resulted in an exponential increase in the number of documents that individuals and companies store. *See* Giacobbe, 57 Wash. & Lee L. Rev. at 262. Each individual employee with a computer has the ability to store thousands of pages of documents, and companies store vast amounts of data on backup tapes. For example, one 8-millimeter magnetic backup tape can store the equivalent of 1500 boxes of paper. *See id.* at 263. This increased capacity to store documents, along with the broad rules of discovery, can result in crippling costs. *See, e.g., Rowe Entm't, Inc.* v. *William Morris Agency, Inc.*, 205 F.R.D. 421, 425 (S.D.N.Y. 2002) (estimating that it would cost more than $9 million to produce years of email contained on backup tapes). The parties must hire vendors to copy or scan physical documents, and experts to search stored electronic documents. *See* Giacobbe, 57 Wash. & Lee L. Rev. at 263-64. Document production alone thus can take months or even years, thousands of hours of attorney's fees, and increasingly, millions of dollars. *See id.* at 265-66.

It has been reported that discovery costs represent 90 per cent of the litigation costs in cases where discovery is actively employed. Memorandum from Hon. Paul V.

Niemeyer, Chair, Advisory Committee on Civil Rules, to Hon. Anthony J. Scirica, Chair, Committee on Rule of Practice & Procedure 4 (May 11, 1999), http://www.uscourts.gov/rules/archive/1999/repcivil.pdf (last visited Aug. 25, 2006). While document production may represent the single greatest cost of discovery, other discovery obligations impose both monetary and nonmonetary costs. For instance, litigants suffer lost productivity because they must make their employees available for depositions and document collection tasks. Wagener, 78 N.Y.U. L. Rev. at 1896.

The often enormous costs of discovery in antitrust cases are borne primarily by defendants. *See* Wagener, 78 N.Y.U. L. Rev. at 1894, 1899 (noting that antitrust plaintiffs can limit their exposure to extensive discovery through pleading); Robert D. Cooter & Daniel L. Rubinfeld, Reforming the New Discovery Rules, 84 Geo. L. J. 61, 68 (1995-96) (noting that "most compliance costs" of discovery are "borne by the complying party"). This is particularly true in the class action context, where most of the information that is relevant to the plaintiffs' claims is likely to be in the possession of the defendant. Moreover, judges have limited ability to curb the enormous costs of discovery. *See* Frank H. Easterbrook, Discovery as Abuse, 69 B.U. L. Rev. 635, 638 (1989) ("Judges can do little about impositional discovery when parties control the legal claims to be presented and conduct the discovery themselves. . . . The portions of the Rules of Civil Procedure calling on judges to trim back excessive demands, therefore, have been, and are doomed to be, hollow."). *See also In re: Brand Name Prescription Drugs Antitrust Litig.*, 1995 U.S. Dist. LEXIS 8281 (N.D. Ill. June 13, 1995) (refusing to shift cost of discovery of 30 million pages of e-mail).

B. The Second Circuit's Standard Encourages Meritless Litigation and Imposes Unjustified Costs On Consumers.

The high cost of conducting discovery creates an incentive for defendants to settle even meritless antitrust suits to avoid the significant costs of discovery. *See* Wagener, 78 N.Y.U. L. Rev. at 1898 ("[D]efendants unable to shift the costs of complying with requests for electronic documents feel pressured to settle lawsuits to avoid the discovery costs."); Giacobbe, 57 Wash. & Lee L. Rev. at 268 ("The prospect of fulfilling these expensive discovery requests forces many defendants to settle rather than incur such tremendous costs at a very early stage of the litigation process."). Even if a defendant concludes that the suit lacks merit, discovery represents a significant cost that likely will never be recovered. In these circumstances, Defendants have an economic incentive to settle simply to avoid the high costs of discovery.

"Strategically minded plaintiffs recognize that defendants risk incurring onerous discovery costs if an antitrust case progresses beyond the pleadings stage." Wagener, 78 N.Y.U. L. Rev. at 1893. This, in turn, creates an incentive for plaintiffs' lawyers to file meritless antitrust actions based on a calculation that defendants may enter into a settlement agreement to avoid costly discovery. To increase the defendants' incentive to settle, plaintiffs are likely to make discovery as costly as possible for defendants. Jonathan T. Molot, How U.S. Procedure Skews Tort Law Incentives, 73 Ind. L.J. 59, 74 (1997) (One reason that "discovery costs are unreasonably high" is that a "party can improve its settlement position by increasing its opponent's anticipated legal costs.").

"[T]o the extent that [discovery] permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement

value, rather than a reasonably founded hope that the process will reveal relevant evidence, it is a social cost rather than a benefit." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 741 (1975). This social cost falls on defendants, the courts, and ultimately on consumers and society itself.

Decisions by antitrust defendants to settle meritless suits to avoid the substantial litigation costs necessary to prevail on the merits will encourage plaintiffs' counsel to file more such suits. The cost of such an escalating spiral of litigation would not be confined to the parties to the case. The resources expended to litigate or settle meritless claims are a cost of doing business, and thus are likely to be passed on to consumers.

III. Private Antitrust Suits Are An Inefficient Means For Discovering Horizontal Antitrust Conspiracies.

An additional reason for rejecting the Second Circuit's pleading standard is that private antitrust suits are not a particularly efficient or effective means of discovering conspiracies in violation of Section 1 of the Sherman Act. Experience shows that most antitrust conspiracies are uncovered by the federal antitrust enforcement agencies, and that most successful private antitrust actions alleging unlawful conspiracies simply follow on from violations initially discovered and prosecuted by the government.[3] Allowing private suits to proceed to discovery whenever competitors engage in

---

[3] *See* John C. Coffee, Jr., Rescuing the Private Attorney General: Why the Model of Lawyer as Bounty Hunter Is Not Working, 42 Md. L. Rev. 215, 220-21 (1983) ("[A]vailable empirical evidence does not provide much support for the thesis that the private attorney general significantly supplements public law enforcement by increasing the probability of detection").

parallel behavior is not necessary or even conducive to "the preservation of economic freedom and our free-enterprise system." *United States* v. *Topco Assocs.*, 405 U.S. 596, 610 (1972).

A. Private Antitrust Suits Alleging Horizontal Antitrust Conspiracies Usually Follow Investigations By The Federal Government.

Since the mid-1990s the Department of Justice has significantly expanded its criminal enforcement program and has recovered nearly $3 billion in fines from antitrust violators.[4] An important part of the DOJ criminal enforcement program is the provision that grants amnesty to the first company to report a violation to the Antitrust Division. The amnesty program has "been the Division's most effective investigative tool" and "[c]ooperation from leniency applicants has cracked more cartels than all other tools at our disposal combined — searches, FBI 'drop in' interviews, informants, Interpol red notice watches, etc."[5]

The Antitrust Criminal Penalty Enhancement and Reform Act of 2004[6] solidified the importance of the amnesty program as the primary method of uncovering cartel activity. The legislation provides that participants

---

[4] *See* Scott D. Hammond, Deputy Assistant Attorney General, speech before the ABA Section of Antirust Law Cartel Enforcement Roundtable: An Update of the Antitrust Division's Criminal Enforcement Program (November 16, 2005), http://www.usdoj.gov/atr/public/speeches/213247.htm.

[5] *See* Scott D. Hammond, presentation by to the OECD Competition Committee, Paris, France: Cracking Cartels With Leniency Programs (October 18, 2005), http://www.usdoj.gov/atr/public/speeches/212269.htm.

[6] Pub. L. No. 108-237, Title II, 118 Stat. 665 (2004).

in the DOJ amnesty program are subject only to actual (not treble) damages in follow-on civil suits. Congress recognized that treble-damages suits are an important part of deterring and punishing illegal behavior, but that are not the primary means by which such conspiracies are detected.

B. Allowing Suits Based On Observed Parallel Conduct Would Discourage Rational Economic Decisionmaking.

As noted above, parallel conduct generally results from competitors' similar reactions to common market conditions. The Second Circuit's standard would allow antitrust suits alleging that parallel conduct resulted from an unlawful conspiracy to proceed to costly discovery, so long as conspiracy is "among the realm of plausible possibilities." Pet. App. 19a. As the Second Circuit made clear, it views allegations of parallel conduct as sufficient to satisfy this "modest" standard. *Id.* at 22a. Thus, the mere existence of parallel business conduct enables plaintiffs to state a claim for conspiracy under Section 1 of the Sherman Act.

The Second Circuit's standard turns lawful and rational business decisions into a factual predicate for antitrust conspiracy, with its attendant potential for substantial legal costs. Under the Second Circuit's standard, companies will be obliged to consider whether to adopt a policy of "conscious nonparallelism" to avoid creating the basis for costly antitrust litigation. Such a policy is likely impossible to implement in many instances and is economically inefficient. Competitors would have to balance the possibility of a lawsuit and costly discovery against other factors in selecting a course of conduct. For instance, were this case to arise again, each Incumbent Local Exchange Carrier ("ILEC") would have to consider not only whether expanding into another ILEC's territory would be in the company's short-term and long-term interest, but also what litigation costs the company might

face if its contemplated parallel action were the basis of an antitrust conspiracy claim. Thus, instead of providing a disincentive for companies to engage in collusion, the Second Circuit's standard could encourage companies to adopt second-best business strategies to avoid litigation costs.

Ironically, actual conspirators could more easily avoid the appearance of parallel conduct than the vast majority of competitors who are not colluding. Conspirators could structure their agreement to avoid overtly parallel conduct that might form the basis of a Sherman Act Section 1 lawsuit. Independent competitors, by contrast, do not have the ability to know what other competitors will do and so may not be able to avoid parallel conduct.

CONCLUSION

The decision of the Second Circuit should be reversed.

Respectfully submitted,

Harry M. Ng
Douglas W. Morris
American Petroleum Institute
1220 L Street, N.W.
Washington, D.C. 20005
(202) 682-8000

Robert A. Long
Counsel of Record
James R. Dean, Jr.
Theodore P. Metzler
Covington & Burling LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004-2401
(202) 662-6000

Counsel for Amicus Curiae

August 2006

1024B

Supreme Court, U.S.
FILED
AUG 25 2006
OFFICE OF THE CLERK

No. 05-1126

In the Supreme Court of the United States

BELL ATLANTIC CORPORATION, ET AL.,
Petitioners,

v.

WILLIAM TWOMBLY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, CTIA – THE WIRELESS ASSOCIATION, THE ALLIANCE OF AUTOMOBILE MANUFACTURERS, THE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA, THE NATIONAL ASSOCIATION OF MANUFACTURERS, NORTHWEST AIRLINES, INC., UNITED AIR LINES, INC., AND WEYERHAEUSER COMPANY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

ROBIN S. CONRAD
AMAR D. SARWAL
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20036
(202) 463-5337

MICHAEL FIELD ALTSCHUL
CTIA – The Wireless Association
1400 16th Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 785-0081

ROY T. ENGLERT, JR.*
DONALD J. RUSSELL
MATTHEW R. SEGAL
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

JOHN T. WHATLEY
Alliance of Automobile Manufacturers
1401 H Street, N.W., Suite 900
Washington, D.C. 20005
(202) 326-5500

* *Counsel of Record*

(additional counsel listed on inside cover)

JAN S. AMUNDSON
QUENTIN RIEGEL
National Association of Manufacturers
1331 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 637-3000

PETER B. KENNEY, JR.
Northwest Airlines, Inc.
Department A1180
2700 Loan Oak Parkway
Eagan, MN 55121-1534
(612) 726-3663

MARK S. POPOFSKY
Kaye Scholer LLP
901 15th Street, N.W.
Washington, D.C. 20005
(202) 682-3500
Counsel for Pharmaceutical Research and Manufacturers of America

KEN KHOURY
GUY STEPHENSON
KATHRYN FEWELL
Weyerhaeuser Company
CH 1 J 28
33663 Weyerhaeuser Way
Federal Way, WA 98003
(253) 924-5091

RICKS P. FRAZIER
United Air Lines, Inc.
1200 E. Algonquin Rd.
Elk Grove Township, IL 60007
(847) 700-4446

SAUL P. MORGENSTERN
ROBERT GRASS
SHEFALI M. KOTHARI
Kaye Scholer LLP
425 Park Avenue
New York, NY 10022
(212) 836-8000
Counsel for Pharmaceutical Research and Manufacturers of America

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

STATEMENT 4

SUMMARY OF ARGUMENT 6

ARGUMENT 8

I. Conclusory Allegations Of Conspiracy Are Insufficient To State A Claim 9

A. Courts Are Not Required To Adopt Inferences And Legal Conclusions That Are Pleaded In A Complaint 11

B. Substantive Antitrust Law Limits The Range Of Permissible Inferences That May Be Drawn From Parallel Behavior 12

C. Courts Should Not Assume That Plaintiffs Can Prove Facts They Have Not Alleged, Or Excuse Plaintiffs From Their Obligation Under Rule 11 To Certify Allegations Of Facts Essential To Their Claims 15

II. Rule 8 Authorizes Courts To Consider The Risk Of Abusive Litigation, Enormous Discovery Costs, And Substantive Legal Doctrine When Construing Pleadings "To Do Substantial Justice" 18

A. Courts Should Recognize The Potential Abuse Of Class Actions When Construing Pleadings 21

TABLE OF CONTENTS (continued)

Page

B. Courts Should Construe Pleadings In Antitrust Cases In Light Of Substantive Antitrust Doctrine 24

CONCLUSION 26

TABLE OF AUTHORITIES

Page(s)

Cases

Associated General Contractors of Cal., Inc. v. *California State Council of Carpenters*,
459 U.S. 519 (1983) ..... *passim*

Bartnicki v. *Vopper*,
532 U.S. 514 (2001) 1

Black & Yates v. *Mahogany Ass'n*,
129 F.2d 227 (3d Cir.), cert. denied,
317 U.S. 672 (1942) 16

Blue Chip Stamps v. *Manor Drug Stores*,
421 U.S. 723 (1975) 19, 20, 21

Bus. Guides, Inc. v. *Chromatic Commc'ns Enters.*,
498 U.S. 533 (1991) 17

Chahal v. *Paine Webber Inc.*,
725 F.2d 20 (2d Cir. 1984) 12

Chongris v. *Bd. of Appeals*,
811 F.2d 36 (1st Cir. 1987) 12

City of Rancho Palos Verdes v. *Abrams*,
544 U.S. 113 (2005) 2

Claybrook v. *Birchwell*,
199 F.3d 350 (6th Cir. 2000) 12

Conley v. *Gibson*,
355 U.S. 41 (1957) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page(s)

Davis v. *Monroe County Bd. of Educ.*,
526 U.S. 629 (1999) 11

DM Research, Inc. v. *Coll. of Am. Pathologists*,
170 F.3d 53 (1st Cir. 1999) 16, 20

Doug Grant, Inc. v. *Greate Bay Casino Corp.*,
232 F.3d 173 (2000) 12

Dura Pharmaceuticals, Inc. v. *Broudo*,
544 U.S. 336 (2005) ..... *passim*

E. Shore Markets, Inc. v. *J.D. Assocs. Ltd. P'ship*,
213 F.3d 175 (4th Cir. 2000) 12

Farm Credit Servs. of Am. v. *Am. State Bank*,
339 F.3d 764 (8th Cir. 2003) 12

Fuentes v. *S. Hills Cardiology*,
946 F.2d 196 (3d Cir. 1991) 16

Halkin v. *VeriFone, Inc. (In re VeriFone Secs. Litig.)*,
11 F.3d 865 (9th Cir. 1993) 12

Havoco of Am., Ltd. v. *Shell Oil Co.*,
626 F.2d 549 (7th Cir. 1980) 12

Haines v. *Kerner*,
404 U.S. 519 (1972) 19

Hughes v. *Rowe*,
449 U.S. 5 (1980) 19

TABLE OF AUTHORITIES—Continued

Page(s)

In re Baby Food Antitrust Litig.,
166 F.3d 112 (3d Cir. 1999) 14

In re Network Assocs., Inc., Sec. Litig.,
76 F. Supp. 2d 1017 (N.D. Cal. 1999) 21

Jackson v. *Birmingham Bd. of Educ.*,
544 U.S. 167 (2005) 11

Kugler v. *Helfant*,
421 U.S. 117 (1975) 11

Matsushita Elec. Indus. Co. v. *Zenith Radio Corp.*,
475 U.S. 574 (1986) ..... *passim*

Maty v. *Grasselli Chem. Co.*,
303 U.S. 197 (1938) 24

Monsanto Co. v. *Spray-Rite Serv. Corp.*,
465 U.S. 752 (1984) 13, 17, 26

Mountain View Pharmacy v. *Abbott Labs.*,
630 F.2d 1383 (10th Cir. 1980) 17

Neitzke v. *Williams*,
490 U.S. 319 (1989) 11

Nelson Radio & Supply Co. v. *Motorola, Inc.*,
200 F.2d 911 (5th Cir. 1953) 17

Newport News Shipbuilding & Dry Dock Co. v. Schauffler,
303 U.S. 54 (1938) 11

TABLE OF AUTHORITIES—Continued

Page(s)

Papasan v. *Allain*,
478 U.S. 265 (1986) 11

Pegram v. *Herdrich*,
530 U.S. 211 (2000) 10

Reiter v. *Sonotone Corp.*,
442 U.S. 330 (1979) 20

Snowden v. *Hughes*,
321 U.S. 1 (1944) 12

Swierkiewicz v. *Sorema N.A.*,
534 U.S. 506 (2002) 18, 21, 24

Tatum v. *State of Iowa*,
822 F.2d 808 (8th Cir. 1987) 15

Theatre Enters., Inc. v. *Para-mount Film Distribution Corp.*,
346 U.S. 537 (1954) 14, 15

Torres v. *Oakland Scavenger Co.*,
487 U.S. 312 (1988) 19

TV Commc'ns Network, Inc. v. *Turner Network Television, Inc.*, 964 F.2d 1022 (10th Cir. 1992) 16

United States v. *AVX Corp.*,
962 F.2d 108 (1st Cir. 1992) 19

Verizon Commc'ns Inc. v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) 13

TABLE OF AUTHORITIES—Continued

Page(s)

Wiles v. *Capitol Indem. Corp.*,
280 F.3d 868 (8th Cir. 2002) 12

Zinermon v. *Burch*,
494 U.S. 113 (1990) 11

Statute and Rules

15 U.S.C. § 1 9

Federal Rule of Civil Procedure 8 ..... *passim*

Federal Rule of Civil Procedure 11 ..... 7, 9, 15, 17

Federal Rule of Civil Procedure 12 ..... *passim*

Federal Rule of Civil Procedure 56 5

Miscellaneous

54 AM. JUR. 2d *Monopolies and Restraints of Trade* 17

2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW (2d ed. 2000) 16

6 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW (2d ed. 2003) 14

HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW (1973) 22

TABLE OF AUTHORITIES—Continued

Page(s)

Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits – The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1 (1971) 22

11 HERBERT HOVENKAMP, ANTITRUST LAW (2d ed. 2005) 25

Mass Torts and Class-Action Lawsuits: Oversight Hearings Regarding Mass Torts and Class Action Lawsuits Before the House Committee on the Judiciary, Subcommittee on Courts and Intellectual Property, 105th Cong. (Mar. 5, 1998), available at http://commdocs.house.gov/committees/judiciary/hju59921.000/hju59921_0.HTM 23

S. Rep. No. 109-14 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3 ..... 21, 22

Linda Silberman, *The Vicissitudes of the American Class Action – With a Comparative Eye*, 7 TUL. J. INT'L & COMP. L. 201 (1999) 22

Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962) 14

5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE (3d ed. 2004) 18, 19

5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE (3d ed. 2004) 11

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community. The Chamber is well situated to brief the Court on the importance of the issues presented in this case to companies collectively responsible for a substantial portion of total U.S. economic activity. The Chamber is concerned not only that the decision below sets a pleading standard for antitrust litigation that is inconsistent with both substantive antitrust law and general pleading law, but also that it does so in a context – a massive consumer class action complaint – that unleashes the most abusive kind of litigation, often brought to coerce settlement of weak cases rather than with any real prospect of success on the merits.

CTIA – The Wireless Association represents all segments of the wireless communications industry. Members of CTIA include service providers, manufacturers, wireless data and Internet companies, and other industry participants. CTIA has filed *amicus* briefs in this Court and other federal courts on a variety of issues of interest to the wireless industry in such disparate cases as *Bartnicki* v. *Vopper*, 532 U.S. 514 (2001), and

---

[1] The parties' blanket consents to the filing of amicus briefs have been lodged with the Clerk. Pursuant to Rule 37.6 of the Rules of this Court, *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity other than the *amici curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief.

City of Rancho Palos Verdes v. *Abrams*, 544 U.S. 113 (2005). Many of CTIA's members provide service directly to consumers, and CTIA is concerned that the decision below might allow massive consumer class actions to proceed without any real factual basis.

The Alliance of Automobile Manufacturers is a trade association composed of nine car and light truck manufacturers. The Alliance is the leading advocacy group for the automobile industry on a range of public policy issues. The Alliance has long been concerned about abusive antitrust litigation, including vexatious class actions.

The Pharmaceutical Research and Manufacturers of America (PhRMA) is a voluntary, nonprofit association that represents the country's leading research-based pharmaceutical and biotechnology companies. PhRMA's members, many of which are based in the Second Circuit, compete in an intellectual-property-driven industry characterized by (i) pervasive federal regulation that applies uniformly to all members, (ii) gatekeepers (doctors and formulary designers) who determine whether and how prescription pharmaceutical products will be used, and (iii) increasingly sophisticated third-party payors who impose similar requirements on all competitors that wish to provide prescription pharmaceuticals to their beneficiary populations. Because they face numerous similar regulatory and market forces, PhRMA's members are often likely to engage in competitive, yet parallel, conduct that the antitrust laws do not prohibit. The Second Circuit's ruling threatens to chill that legitimate business conduct, impose harm on PhRMA's members, and harm American consumers.

The National Association of Manufacturers is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 States. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about

the vital role of manufacturing to America's economic future and living standards. The NAM is concerned that the decision below will thwart healthy competition and impede the economic growth that the NAM seeks to promote.

Northwest Airlines and United Air Lines are two of the world's five largest airlines. Each has been providing passenger service continuously since the 1920s. Northwest and United operate in an industry in which sustained profitability has been extremely elusive. Yet the forces of competition often leave particular routes served only by one or two carriers, and rational business decisionmaking in this industry necessarily depends on assessments of – but not agreement on – other carriers' likely responses. The resulting high "market shares" and appearances of interdependent carrier behavior may make airlines attractive targets for spurious antitrust litigation. If the pleading threshold is as low as the Second Circuit has indicated in the decision below, Northwest and United are concerned that they may be subjected to meritless antitrust litigation, including class actions, brought by counsel in possession of observations of lawful "parallel" conduct by airlines but no facts at all to suggest an actual antitrust violation.

Weyerhaeuser Company was incorporated in 1900 and is one of the world's largest integrated forest products companies. It has offices or operations in 18 countries, with customers worldwide. Weyerhaeuser is principally engaged in the growing and harvesting of timber; the manufacture, distribution, and sale of forest products; and real estate construction, development and related activities. Forest product companies operate in a competitive, tight market place where independent parallelism is a necessary fact of life. A pleading threshold as low as that advanced by the Second Circuit will involve the forest product industry in a myriad of expensive litigation based on market conditions rather than facts constituting a conspiracy.

STATEMENT

If a plaintiff must prove certain facts to be entitled to relief, then it must allege those facts to state a valid claim. By disregarding that basic rule, the Second Circuit has permitted an enormous yet inevitably futile case to proceed. Indeed, the very first sentence of the district court's opinion gives a hint of just how remarkable the present litigation is: "Plaintiffs William Twombly and Lawrence Marcus bring this putative class action on behalf of themselves and *all other individuals who purchased local telephone or high speed internet services in the continental United States between February 8, 1996, and the present*." Pet. App. 35a (emphasis added). In fact, the case is even more gargantuan: "This lawsuit is brought as a class action on behalf of all individuals *and entities* who purchased local telephone and/or high speed internet services * * *." JA 10 (Am. Compl. ¶ 1, emphasis added). Essentially, this is a lawsuit on behalf of virtually every business in the continental United States and every human being who has set foot in the continental United States over a multi-year period. Even more remarkably, this case is one in which the core allegation is that, but for a vaguely pleaded "conspiracy," the structure of an entire industry would have been different, with each defendant entering markets it has chosen not to enter and competing more "meaningfully" in the markets of its competitors. See *id.* at 27 (Am. Compl. ¶ 51).

Plaintiffs originally filed a complaint under Section 2 of the Sherman Act, alleging that defendants engaged in illegal monopolization. Plaintiffs abandoned their monopolization claim when it became clear that it could not succeed, then turned to a different court where they added a conclusory allegation of "conspiracy," alleged "upon information and belief." Lacking any evidence of conspiracy, plaintiffs argued that an agreement should be inferred from defendants' parallel conduct. This time around, the plaintiffs argued that defendants' conduct – the same conduct plaintiffs previously described as a profitable and anticompetitive course of unilateral behavior – would not make

sense in the absence of a conspiracy. See Pet. 4-5; JA 27 (Am. Compl. ¶ 51).

The district court acknowledged that "[a]ll reasonable inferences are to be drawn in the plaintiffs' favor," Pet. App. 40a, but believed itself at liberty to examine the complaint through the lens of substantive antitrust doctrine and to dismiss the complaint because it alleged only lawful parallel conduct, with a conclusory "conspiracy" allegation tacked on. The allegations of parallel conduct, even if true, could not support any inference that defendants had entered into an illegal agreement. The court of appeals, by contrast, reversed "[b]ecause we disagree with the standard that the district court applied in reviewing the sufficiency of the plaintiffs' allegations." Pet. App. 3a. Although parallel conduct is lawful, and additional facts must therefore be proved to permit an inference that otherwise-lawful parallel conduct was the product of an unlawful conspiracy, the court concluded that alleging such additional facts was unnecessary at the pleading stage. Pet. App. 25a (facts alleged are sufficient as long as they do not rule out conspiracy as a "'plausible' possibility"). The court was prepared to let the antitrust complaint in this case go forward on the theory that "a pleading of facts indicating parallel conduct by the defendants" – *i.e.*, pleading *only* lawful behavior – "can suffice to state a plausible claim of conspiracy." *Ibid.*

The court of appeals criticized district court decisions (including the one it was reversing) that have looked to "facts beyond 'conscious parallelism'" at the pleading stage as "elid[ing] the distinction between the standard applicable to Rule 12(b)(6) and Rule 56 motions on the basis of a well-founded concern that to do so otherwise would be to condemn defendants to potentially limitless 'fishing expeditions' – discovery pursued just 'in case anything turn[s] up' – in hopes, perhaps, of a favorable settlement in any event." Pet. App. 27a (footnotes omitted). Although the point of those decisions is simply that a complaint alleging only *lawful* conduct should be dismissed, the court of appeals viewed them as imposing an

impermissible "heightened pleading requirement." *Id.* at 28a. The court was "not unsympathetic" to concerns about vexatious litigation (*ibid.*; see also *id.* at 30a) but thought such concerns irrelevant under this Court's precedents.

SUMMARY OF ARGUMENT

Federal Rule of Civil Procedure 8(f) commands that "all pleadings shall be so construed as to do substantial justice." *Conley* v. *Gibson*, 355 U.S. 41, 48 (1957), relied on that instruction and added that pleading should not be treated as a "game of skill" but that instead "[t]he purpose of pleading is to facilitate a proper decision on the merits." Here plaintiffs – not defendants – are treating pleading as a game of skill, in which they can impose great cost on defendants through artful pleading in which the alleged "fact" of a conspiracy is in reality an inference that lacks any real support from the facts that have been alleged.

Although courts must assume the truth of factual allegations when they rule on a motion to dismiss, they can and should independently evaluate – under the controlling principles of *law* – the reasoning that underlies inferences and legal conclusions. They need not accept legally impermissible inferences that plaintiffs seek to draw from the facts that they have alleged.

Courts should look to the substantive law that governs a claim to decide which inferences are permissible. Antitrust law makes clear that an anticompetitive conspiracy may *not* be inferred merely from parallel conduct. Something more than parallel conduct must be shown to prove a conspiracy. Because concerted action is an essential element of any claim under Section 1 of the Sherman Act, and because a conspiracy cannot be inferred from parallel conduct alone, something more than parallel conduct – *i.e.*, facts "showing that the pleader is entitled to relief" (Fed. R. Civ. P. 8(a)) – must be alleged to state a claim upon which relief can be granted.

Courts should not deny a motion to dismiss because there *might be* facts that would support a claim, when the plaintiffs

have not alleged such facts. This Court held in *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983), and reaffirmed in *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336 (2005), that, if plaintiffs must prove certain facts to prevail on the merits, they must allege those facts to state a valid claim. That principle is in accord with Rule 11 of the Federal Rules of Civil Procedure. The Second Circuit's decision, that a complaint is sufficient if there might be unpleaded facts that would support liability, relieves plaintiffs of their obligation to certify allegations of essential elements of their claims.

The Second Circuit was also wrong when it concluded that it was powerless to consider the practical consequences of its ruling – *i.e.*, that its decision would permit virtually any complaint alleging parallel conduct to survive a motion to dismiss; that such complaints could impose colossal expense on defendants and subject them to blackmail settlements; that such results would encourage still more abusive cases; and that the result would adversely affect businesses that had done no wrong. Rule 8(f) requires pleadings to be construed "to do substantial justice," and this Court has more than once acknowledged that the risk of vexatious litigation is a relevant factor that should be considered when a court rules on a motion to dismiss.

It is entirely appropriate to consider the risk that lawyer-driven class actions, like this case, systematically lead to what Judge Friendly, borrowing terminology from antitrust scholar Milton Handler, called "blackmail settlements." Because of the risk that massive class actions will be filed solely to pressure defendants to settle rather than endure enormous discovery costs, even though the claims have no merit, it is proper for courts to scrutinize such cases more carefully than cases that do not entail such risks.

Similarly, the Second Circuit should not have deemed irrelevant to its decision the fact that it would permit plaintiffs to impose large discovery costs merely by alleging parallel business behavior that is endemic in the economy, that is almost

always desirable, and that rarely suggests anticompetitive collusion. Parallel conduct may be especially common in regulated industries, because pervasive, uniformly applied regulations and regulators' directives make similar reactions by firms to similar market forces inevitable. The costs of permitting vexatious litigation challenging such innocuous yet parallel conduct to proceed could be crippling.

The federal rules do *not* require courts to look at a massive lawsuit that threatens enormous discovery costs, and that is filed by sophisticated class-action lawyers on the flimsiest of evidence, through the same lens with which they would examine a different kind of case. And, especially in a case such as this one, the rules do not require courts to assume that there might be facts that were *not* alleged that would support a claim, when the facts that the plaintiffs *have* alleged are plainly inadequate to do so.

ARGUMENT

In *Conley* v. *Gibson*, 355 U.S. 41 (1957), the Court did not set down principles that favor plaintiffs in every case. Rather, it "[f]ollow[ed] the simple guide of [Federal] Rule [of Civil Procedure] 8(f) that 'all pleadings shall be so construed as to do substantial justice.'" 355 U.S. at 48. The Court further decried the notion that "pleading is a game of skill." *Ibid.* "[T]he purpose of pleading is to facilitate a proper decision on the merits." *Ibid.*

Under those three principles, as enshrined in the federal rules, plaintiffs are not required to allege *every* fact that might support their claims, before they have had any opportunity to take discovery. But they must allege *enough* facts to show that they will have a legally valid claim, if they can eventually prove their allegations. See Fed. R. Civ. P. 8(a) ("A pleading which sets forth a claim for relief * * * shall contain * * * a short and plain statement of the claim showing that the pleader is entitled to relief * * *."). Plaintiffs cannot subject defendants to the costs of discovery and litigation unless there is *sufficient* reason

to believe that the factual allegations are true; such allegations must "have evidentiary support or, if specifically so identified, [be] *likely* to have evidentiary support after a reasonable opportunity for further investigation or discovery." Fed. R. Civ. P. 11(b)(3) (emphasis added). Courts must assume the truth of plaintiffs' factual allegations when ruling on a motion to dismiss. But courts need not and should not automatically assume the validity of inferences, deductions, and legal conclusions that plaintiffs seek to draw from those alleged facts. When applying these principles, courts are required to apply substantive legal doctrine to the allegations of the complaint, and are permitted to consider practical realities.

Yet the Second Circuit here did just the opposite, treating a substantive antitrust principle as if it had no applicability until the summary-judgment stage, and recognizing many practical realities that counseled in favor of dismissal but declaring it illegitimate to base a decision on those realities. Those errors should be reversed.

I. Conclusory Allegations Of Conspiracy Are Insufficient To State A Claim

When a complaint reveals fatal flaws in the plaintiffs' theory of the case, doing substantial justice requires dismissing the complaint, not trying to imagine some hypothetical way for the fatal flaws to be overcome. *E.g.*, *Associated Gen. Contractors*, 459 U.S. at 526. In this case, plaintiffs' claim under Section 1 of the Sherman Act depends on proving something that their amended complaint does not directly allege, namely, facts evidencing a "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." Pet. App. 3a (quoting 15 U.S.C. § 1). The Second Circuit observed that "the amended complaint does not identify specific instances of conspiratorial conduct or communications." Pet. App. 31a. Rather, as plaintiffs acknowledged in opposing the petition, their conspiracy claim rests not on direct evidence but on the inference they would like the Court to draw that there are

"strong grounds for believing a horizontal conspiracy *may exist* among the Defendants." Br. in Opp. 21 (emphasis added).[2]

To support that desired inference, the amended complaint reasons that the defendants' parallel conduct "would be anomalous in the absence of an agreement * * * not to compete." JA 21 (Am. Compl. ¶ 40). That allegation, of course, is squarely inconsistent with the theory of the plaintiffs' earlier complaint alleging a violation of Section 2 of the Sherman Act, *i.e.*, that the same conduct (without the "conspiracy" conclusorily alleged in the later Section 1 complaint) was supposedly profitable as a *unilateral* act of monopolization.

The district court's carefully reasoned opinion explained why the *facts* alleged by the plaintiffs could not, under applicable antitrust law, support the *inference* that defendants had entered into a conspiracy not to compete against one another. The Second Circuit reversed, not because it concluded that a conspiracy was likely if the factual allegations were true, but because it could not conclude that a conspiracy was wholly implausible. Pet. App. 25a. It treated the allegation of conspiracy as a factual allegation that must be assumed to be true, unless the other allegations in the complaint indicated that conspiracy was a virtual impossibility – a standard that would permit "'*any* claim asserting parallel conduct [to] survive a motion to dismiss.'" *Id.* at 28a (quoting Appellees' Br. at 29) (emphasis altered). That is not a correct understanding of the law of pleading. Whether an inference is a permissible one is a question for a court applying law to pleaded facts.

---

[2] "Though this case involves a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6)," plaintiffs' briefing "may [be] use[d] * * * to clarify allegations in [their] complaint." *Pegram* v. *Herdrich*, 530 U.S. 211, 230 n.10 (2000).

A. Courts Are Not Required To Adopt Inferences And Legal Conclusions That Are Pleaded In A Complaint

The Federal Rules of Civil Procedure and this Court's precedents do not require blind credulity when it comes to inferences and legal conclusions pleaded in a complaint. At the motion-to-dismiss stage, *factual* allegations must of course be accepted as true. See *Zinermon* v. *Burch*, 494 U.S. 113, 118 (1990); *Kugler* v. *Helfant*, 421 U.S. 117, 125 n.5 (1975).[3] But "there are other types of allegations that need not be accepted as true on a Rule 12(b)(6) motion." 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357, at 521 (3d ed. 2004). "Among these are that the district court is not bound by a pleading's * * * 'unwarranted inferences,' or its 'unwarranted deductions.'" *Id.* § 1357, at 521-539 (footnotes omitted). And courts are not bound by "a legal conclusion couched as a factual allegation." *Papasan* v. *Allain*, 478 U.S. 265, 286 (1986).

Courts must assume the truth of factual allegations but need not accept mere inferences because, whereas courts are not well situated to evaluate factual assertions at the pleadings stage, they are institutionally equipped to evaluate the legal reasoning plaintiffs apply to those claims. See *Associated Gen. Contractors*, 459 U.S. at 526; *Newport News Shipbuilding & Dry Dock Co.* v. *Schauffler*, 303 U.S. 54, 57 (1938) ("The motion admits as facts allegations describing the manner in which the business is carried on, but not legal conclusions from those facts."). Even at the motion-to-dismiss stage, courts are authorized "to dismiss a claim on the basis of a dispositive issue of law." *Neitzke* v. *Williams*, 490 U.S. 319, 326 (1989). Thus, although a court must defer to factual allegations at the motion-to-dismiss stage, "if the allegations of the complaint fail to

---

[3] See also *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 171 (2005) (material facts must be accepted as true); *Davis* v. *Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999) (same).

establish the requisite elements of the cause of action, our requiring costly and time consuming discovery and trial work would represent" not fulfillment, but "abdication," of "judicial responsibility." *Havoco of Am., Ltd.* v. *Shell Oil Co.*, 626 F.2d 549, 553 (7th Cir. 1980).[4]

Here, plaintiffs openly acknowledge that their claim rests on "an inference of conspiracy." Pet. Opp. 24. That inference is merely an "'opprobrious epithet[],'" worthy of only as much deference as this Court's precedents will allow. *Chongris* v. *Bd. of Appeals*, 811 F.2d 36, 37 (1st Cir. 1987) (quoting *Snowden* v. *Hughes*, 321 U.S. 1, 10 (1944)).

B. Substantive Antitrust Law Limits The Range Of Permissible Inferences That May Be Drawn From Parallel Behavior

The *judicial* responsibility to decide what inferences, deductions, and legal conclusions may be drawn from the

---

[4] Accord, *e.g.*, *Farm Credit Servs. of Am.* v. *Am. State Bank*, 339 F.3d 764, 767 (8th Cir. 2003) ("[W]e are 'free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations.'" (quoting *Wiles* v. *Capitol Indem. Corp.*, 280 F.3d 868, 870 (8th Cir. 2002))); *Doug Grant, Inc.* v. *Greate Bay Casino Corp.*, 232 F.3d 173, 183-184 (2000) ("[W]hile our standard of review requires us to accept as true all factual allegations in the complaint, we need not accept as true unsupported conclusions and unwarranted inferences.") (internal quotation marks omitted); *E. Shore Markets, Inc.* v. *J.D. Assocs. Ltd. P'ship*, 213 F.3d 175, 180 (4th Cir. 2000) ("[W]e need not accept as true unwarranted inferences, unreasonable conclusions, or arguments."); *Claybrook* v. *Birchwell*, 199 F.3d 350, 353 n.1 (6th Cir. 2000) ("A court is not bound to accept alleged legal conclusions or unwarranted factual inferences."); *Halkin* v. *VeriFone, Inc.* (*In re VeriFone Secs. Litig.*), 11 F.3d 865, 868 (9th Cir. 1993) ("Conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim."); *Chahal* v. *Paine Webber Inc.*, 725 F.2d 20, 23 (2d Cir. 1984) ("[W]hen a complaint fails to state facts as distinguished from conclusions or vague general allegations we have not hesitated to uphold its dismissal.").

plaintiff's factual allegations should be controlled by the substantive law that governs the asserted claim. *E.g.*, *Associated Gen. Contractors*, 459 U.S. at 526. Even at the motion-to-dismiss stage, this Court has never shied away from a searching application of substantive antitrust principles to the plaintiffs' theory of the case.[5] Such an application is not, as the court of appeals mistakenly believed, applying a "heightened pleading standard." Rather, it is recognizing that the distinctions made important by substantive antitrust law should be observed at *every* stage of the litigation. To recognize those distinctions is doing nothing more than "facilitat[ing] a proper decision on the merits," as *Conley* commands. 355 U.S. at 48.

This Court's antitrust decisions make it clear that a conspiracy could not properly be inferred from respondents' factual allegations of parallel conduct. Those allegations, even if true, would not permit a factfinder applying antitrust law to infer the existence of an anticompetitive agreement. "[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). Rather, a plaintiff's burden is to "present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Ibid.* (quoting *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)). In addition to parallel conduct, plaintiffs must allege *facts* tending to show that the parallel conduct was not as innocent as it appears on its face. These facts can take many forms and will

---

[5] See, *e.g.*, *Verizon Commc'ns Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (reversing Second Circuit decision that had reversed grant of motion to dismiss antitrust case: "The question before us today is whether the allegations of respondent's complaint fit within existing exceptions [to the general principle that a firm need not help its rivals] or provide a basis, under traditional antitrust principles, for recognizing a new one."); *id.* at 414 ("Against the slight benefits of antitrust intervention here, we must weigh a realistic assessment of its costs.").

include, at a minimum, facts courts have labeled as "plus factors." *E.g.*, Pet. App. 42a; *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 122 (3d Cir. 1999) (defining "plus factors" as "*necessary* conditions for the conspiracy inference") (emphasis added).

Although *Matsushita* was this Court's most recent effort to grapple with the problems stemming from the prevalence of "parallel" business behavior, it was by no means the first. More than 50 years ago, this Court addressed the issue in an opinion by Justice Tom C. Clark, who had previously been the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice. In *Theatre Enterprises, Inc.* v. *Paramount Film Distribution Corp.*, 346 U.S. 537 (1954), the Court declared emphatically that agreement may *not* be inferred from parallel behavior alone. "Seemingly with some exasperation, the *Theatre Enterprises* opinion declared that 'circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but "conscious parallelism" has not yet read conspiracy out of the Sherman Act entirely.'" 6 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1412b, at 70 (2d ed. 2003) (quoting *Theatre Enters.*, 346 U.S. at 541).

Just a few years after this Court decided *Theatre Enterprises*, a leading antitrust commentator wrote: "The point is that conscious parallelism is never meaningful by itself, but always assumes whatever significance it might have from additional facts." Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 658 (1962). Substantive antitrust law – not a doctrine of civil procedure applicable only at the summary-judgment stage – makes it critical that a plaintiff wishing to pursue conspiracy allegations identify relevant facts beyond "[m]ere parallelism," which "is not itself a compelling subject for legal control." 6 AREEDA & HOVENKAMP, *supra*, ¶ 1417g, at 115.

Matsushita and *Theatre Enterprises* cannot be cabined to summary-judgment determinations, as the Second Circuit believed. See Pet. App. 24a-25a. It is not some peculiar feature of the summary-judgment standard, but rather "antitrust law," that "limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Matsushita*, 475 U.S. at 588. Because the purpose of looking beyond mere parallelism to facts "showing that the pleader is entitled to relief" (Fed. R. Civ. P. 8(a)) is to separate lawful from unlawful conduct, such facts must be alleged in order to "state a claim upon which relief can be granted" (Fed. R. Civ. P. 12(b)(6)).

C. Courts Should Not Assume That Plaintiffs Can Prove Facts They Have Not Alleged, Or Excuse Plaintiffs From Their Obligation Under Rule 11 To Certify Allegations Of Facts Essential To Their Claims

The need for courts to distinguish between factual allegations, on the one hand, and the inferences and legal conclusions that plaintiffs seek to draw from those allegations, on the other, is reinforced by two additional considerations. First, the concept of notice pleading does not authorize a court "to assume that the [plaintiff] can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged." *Associated Gen. Contractors*, 459 U.S. at 526; see also *Tatum* v. *State of Iowa*, 822 F.2d 808, 810 (8th Cir. 1987) ("To state a claim sufficient to withstand a motion to dismiss, a plaintiff must state facts which, if proved, would support his claim and entitle him to relief."). The Court reaffirmed that principle recently in *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336 (2005). Applying Federal Rule of Civil Procedure 8, the Court explained that plaintiffs' allegations that they were "'damaged'" by "'pa[ying] artificially inflated prices'" for securities was insufficient as a matter of law to establish proximate causation because that allegation, even if proven, "is not itself a relevant economic loss" and "the complaint nowhere else provides the defendants with notice

* * * of what the causal connection might be between that loss and the [alleged] misrepresentation." *Id.* at 347. The Court acknowledged that "an initially inflated purchase price *might* mean a later loss." *Id.* at 342 (emphasis in original). But unlike the Second Circuit in this case, which required the defendants to show that there was "no set of [unpleaded] facts that would permit [the] plaintiff to demonstrate" a valid claim (Pet. App. 25a), this Court in *Dura* (and in *Associated General Contractors*) placed the burden of alleging essential facts precisely where it belongs – on the party seeking to initiate litigation.

The leading antitrust treatise, citing *Associated General Contractors*, explains that "a complaint may be dismissed when it fails to allege some fact that is essential to the cause of action * * * [F]ailure to allege a fact essential to the claim is tantamount to an admission that that fact cannot or will not be established." 2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 307(c)(1), at 71 (2d ed. 2000). That observation applies with special force to conclusory allegations of antitrust conspiracies because "terms like 'conspiracy,' or even 'agreement,' are border-line," in that they risk masking a complaint's failure to allege actual facts supporting its legal claims. *DM Research, Inc.* v. *Coll. of Am. Pathologists*, 170 F.3d 53, 56 (1st Cir. 1999) (Boudin, J.). Consequently, courts of appeals have for decades relied on the principle that:

> [a] general allegation of conspiracy without a statement of the facts is an allegation of a legal conclusion and insufficient of itself to constitute a cause of action * * *[;] plaintiffs must plead the facts constituting the conspiracy, its object and accomplishment.

Fuentes v. *S. Hills Cardiology*, 946 F.2d 196, 201-202 (3d Cir. 1991) (quoting *Black & Yates* v. *Mahogany Ass'n*, 129 F.2d 227, 231 (3d Cir.), cert. denied, 317 U.S. 672 (1942)).[6]

---

[6] See also *TV Commc'ns Network, Inc.* v. *Turner Network Television,*

The holdings of *Dura* and *Associated General Contractors* – that, if a plaintiff must prove particular facts in order to prevail on the merits, the plaintiff must allege those facts to survive a motion to dismiss – fit hand in glove with the requirements of Rule 11. That rule requires that allegations and other factual contentions have or be likely to have evidentiary support. The essence of that requirement is that "signing denotes merit." *Bus. Guides, Inc.* v. *Chromatic Commc'ns Enters.*, 498 U.S. 533, 546 (1991). But the substance of that requirement would be largely eliminated if plaintiffs were excused from any requirement to allege facts that are essential to a meritorious claim. Even if conspiracy could be one *possible* explanation for the parallel conduct alleged in this case (as, presumably, it could be in *any* case of parallel conduct), in the absence of direct evidence other facts are needed before conspiracy can be regarded as a *likely* explanation. To support the essential element of their claim, plaintiffs should be required to allege facts that "'tend[] to exclude the possibility that the alleged conspirators acted independently.'" *Matsushita*, 475 U.S. at 588 (quoting *Monsanto*, 465 U.S. at 764). A rule that shifts the burden to the defendant to demonstrate that there is "no set of facts" (Pet. App. 25a) that could support liability – whether or not the plaintiff has alleged those facts – and that draws "all inferences in favor of the plaintiffs" (*id.* at 30a) instead of only *legally reasonable* inferences, vitiates the protections of Rule 11.

Inc., 964 F.2d 1022, 1026 (10th Cir. 1992) ("'[A] bare bones [accusation] of conspiracy * * * without any supporting facts' is insufficient to state an antitrust claim." (quoting *Mountain View Pharmacy v. Abbott Labs.*, 630 F.2d 1383, 1388 (10th Cir. 1980))); 54 AM. JUR. 2d *Monopolies and Restraints of Trade* § 484 ("In a civil action alleging a conspiracy in violation of Section 1 of the Sherman Act, a general allegation of conspiracy is merely a legal conclusion and is insufficient to state a cause of action." (citing *Nelson Radio & Supply Co.* v. *Motorola, Inc.*, 200 F.2d 911, 913-914 (5th Cir. 1953))) (footnote omitted).

II. Rule 8 Authorizes Courts To Consider The Risk Of Abusive Litigation, Enormous Discovery Costs, And Substantive Legal Doctrine When Construing Pleadings "To Do Substantial Justice"

The Second Circuit also erred when it acknowledged, but refused to give effect to, the rationale of *Conley*. There, this Court "[f]ollow[ed] the simple guide of [Federal] Rule [of Civil Procedure] 8(f) that 'all pleadings shall be so construed as to do substantial justice.'" 355 U.S. at 48. The Court further decried the notion that "pleading is a game of skill." *Ibid.* "[T]he purpose of pleading is to facilitate a proper decision on the merits." *Ibid.*

The Second Circuit failed to comprehend the proper application of each of those principles. It recognized that its decision would permit virtually any allegation of lawful parallel conduct to survive a motion to dismiss (Pet. App. 28a); that it could permit plaintiffs asserting meritless claims to exact "colossal expense" and blackmail settlements (*id.* at 30a); that "the success of such meritless claims [in coercing settlements] encourages others to be brought" (*ibid.*); and that the result could be "potentially limitless 'fishing expeditions'" (Pet. App. 27a) and "a deleterious effect on the manner in which and efficiency with which business is conducted" (*id.* at 30a). Despite all that, the Second Circuit reversed.

But Rule 8(f), which requires that "[a]ll pleadings shall be so construed as to do substantial justice," is not empty verbiage. Rather, Rule 8(f)'s substantial justice requirement is "inextricably linked to Rule 8(a)'s simplified notice pleading standard." *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506, 513 (2002). Similarly, "[w]ise judicial discretion is needed to assure that the mandate of Rule 1, which calls for the 'just, speedy, and inexpensive determination of every action,' is applied to effectuate the philosophy underlying the pleading standard." 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1218, at 273 (3d ed. 2004). To achieve "substantial justice," courts must pay attention to context.

Consequently, "the appropriate level of generality for a pleading depends on the particular issue in question or the substantive context of the case before the court." 5 WRIGHT & MILLER, *supra*, § 1218, at 273; see also *United States* v. *AVX Corp.*, 962 F.2d 108, 115 (1st Cir. 1992) ("Although the legal standard for reviewing a motion under Rule 12(b)(6) remains constant, the degree of specificity with which the operative facts must be stated in the pleadings varies depending on the case's context."). For example, it is "settled law" that complaints drafted by *pro se* plaintiffs, "'however inartfully pleaded' are held 'to less stringent standards than formal pleadings drafted by lawyers." *Hughes* v. *Rowe*, 449 U.S. 5, 9 (1980) (quoting *Haines* v. *Kerner*, 404 U.S. 519, 520 (1972)). Similarly, courts often review a plaintiff's amended complaint with greater rigor than the original complaint.[7] In each context, the proper approach to the pleadings ensures that "'mere technicalities' should not stand in the way of consideration of a case on its merits." *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 316 (1988).

More pertinent here, the principle that game-playing litigation behavior should not be rewarded also requires courts to weigh *defendants'* interests in being protected against vexatious litigation. In *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975), which reached this Court from the lower courts' conflicting decisions with respect to a motion to dismiss, the Court wrote:

> [I]n this type of litigation, where the mere existence of an unresolved lawsuit has settlement value to the plaintiff not only because of the possibility that he may prevail on the

---

[7] *E.g.*, 5 WRIGHT & MILLER, *supra*, § 1217, at 258-263 (3d ed. 2004) ("Th[e] reluctance on the part of federal courts to dismiss * * * understandably manifests itself most prominently and most frequently when the plaintiff is appearing pro se. Conversely, the federal courts are far less charitable when one or more amended pleadings already have been filed with no measurable increase in clarity.") (footnote omitted).

> merits, an entirely legitimate component of settlement value, but because of the threat of extensive discovery and disruption of normal business activities which may accompany a lawsuit which is groundless in any event, but cannot be proved so before trial, such a factor is not to be totally dismissed.

421 U.S. at 742-743. In the antitrust context, this Court has advised the district courts to "use the tools available" to curb "class-action harassment" and "windfall settlements." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 345 (1979). "Certainly in a case of this magnitude," those tools include "the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Associated General Contractors*, 459 U.S. at 528 n.17.[8]

This Court's *Dura* opinion found it appropriate to observe – as a factor supporting a Rule 12(b)(6) dismissal – that:

> allowing a plaintiff to forgo giving any indication of the economic loss and proximate cause that the plaintiff has in mind would * * * permit a plaintiff "with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the [discovery] process will reveal relevant evidence."

544 U.S. at 347 (quoting *Blue Chip Stamps*, 421 U.S. at 741). Notably, the Court made that observation in *Dura* even as it "assume[d], at least for argument's sake, that neither the Rules nor the securities statutes impose any special further re-

---

[8] See also *DM Research, Inc.*, 170 F.3d at 55 ("[T]he price of entry, even to discovery, is for the plaintiff to allege a *factual* predicate concrete enough to warrant further proceedings, which may be costly and burdensome.").

quirement in respect to the pleading of proximate causation or economic loss." 544 U.S. at 346. The Court did not disavow – indeed, it noted with approval (544 U.S. at 346-347) – the "simple test" of *Conley* v. *Gibson* and the "not * * * great burden" of *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. at 513-515. Nonetheless, the Court recognized that concerns about abusive litigation were relevant to its evaluation of the motion to dismiss and, in applying the ordinary standards of Rule 8 and Rule 12(b)(6), held that, where plaintiffs must *prove* particular facts to prevail, they must also "*allege* th[o]se requirements" to survive a motion to dismiss. 544 U.S. at 346. Only then might a plaintiff harbor a "'reasonably founded hope'" that discovery will reveal evidence establishing liability. *Id.* at 347 (quoting *Blue Chip Stamps*, 421 U.S. at 741).

These cases reflect a simple principle. Properly construed and applied, the Federal Rules of Civil Procedure permit – even require – courts to recognize reality: that some complaints warrant closer scrutiny than others, because of the risk and the reality of abusive litigation.

A. Courts Should Recognize The Potential Abuse Of Class Actions When Construing Pleadings

It is no accident that the pleading question presented here arises in the context of a putative class action brought by a law firm that is part of the organized plaintiffs' class-action bar. In cases of this sort, "the lawyers who bring the lawsuits effectively control the litigation * * *. In short, the clients are marginally relevant at best." S. Rep. No. 109-14, at 4 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 5; see also *In re Network Assocs., Inc., Sec. Litig.*, 76 F. Supp. 2d 1017, 1032 (N.D. Cal. 1999) (quoting attorney William S. Lerach: "I have the greatest practice in the world because I have no clients. I bring the case. I hire the plaintiff. I do not have some client telling me what to do. I decide what to do.").

The impetus for cases like this one is not actual suspicion of wrongdoing, and certainly not the expectation that an actual

trial on the merits will yield success, but the hope that the thinnest of allegations, with the greatest of legal consequences, will survive motions to dismiss and begin to put pressure on defendants to settle complex litigation.[9] Judge Friendly – borrowing a term used earlier by antitrust scholar Milton Handler – termed this the "blackmail settlement." HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973) (citing Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits – The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971)).

The Senate Judiciary Committee observed last year:

> Because class actions are such a powerful tool, they can give a class attorney unbounded leverage, particularly in jurisdictions that are considered plaintiff-friendly. Such leverage can essentially force corporate defendants to pay ransom to class attorneys by settling – rather than litigating – frivolous lawsuits. This is a particularly alarming abuse because the class action device is intended to be a procedural tool and not a mechanism that affects the substantive outcome of a lawsuit. * * * [W]hen plaintiffs seek hundreds of millions of dollars in damages, basic economics can force a corporation to settle the suit, even if it is meritless and has only a five percent chance of success.
>
> Not surprisingly, the ability to exercise unbounded leverage over a defendant corporation and the lure of huge attorneys' fees have led to the filing of many frivolous class actions.

S. Rep. No. 109-14, at 20-21 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 21.

---

[9] See Linda Silberman, *The Vicissitudes of the American Class Action – With a Comparative Eye*, 7 TUL. J. INT'L & COMP. L. 201, 205 (1999).

Former Attorney General Dick Thornburgh put the matter even more bluntly seven years earlier in testimony before the House Judiciary Committee:

> There is nothing inherently wrong with the general concept of the class action lawsuit or the theory of aggregation of claims. These suits have held an honored place in American law and in British common law for centuries. Adjudication for a class has always been feasible whenever class members have a common legal interest that could not practically be resolved one at a time.
>
> * * * * *
>
> Relatively recently, however, plaintiffs' lawyers, often styling themselves consumer attorneys, have been allowed to wield class actions as judicial weapons of mass destruction.
>
> These suits promise such devastating consequences that even the most innocent of defendants must settle or risk near total annihilation.
>
> To add insult to these injuries, these plaintiffs' lawyers purport to hold the moral high ground. They act as if they were not mere attorneys, but private sector attorneys general. Yet, they are not bound or constrained in any way by Democratic processes.
>
> * * * * *
>
> Far more corrupting to the law, these class actions are often initiated, not by the class members themselves, but by a group of class action lawyers who divide up shares of litigation as if lawsuits were investment properties.

Mass Torts and Class-Action Lawsuits: Oversight Hearings Regarding Mass Torts and Class Action Lawsuits Before the House Committee on the Judiciary, Subcommittee on Courts and Intellectual Property, 105th Cong. 29-30 (Mar. 5, 1998) (testimony of former Attorney General Dick Thornburgh),

available at http://commdocs.house.gov/committees/judiciary/hju59921.000/hju59921_0.HTM.

The present case is a prime example. It is based on a theory that the structure of an entire industry would have changed dramatically in a few short years, but for antitrust violations. Plaintiffs allege that virtually the entire industry participated in those violations and seek relief on behalf of hundreds of millions of people and businesses. Such a far-reaching lawsuit should not be allowed to proceed after such a toothless review of the complaint's allegations as that undertaken by the court of appeals. "Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent the achievement of that end." *Maty* v. *Grasselli Chem. Co.*, 303 U.S. 197, 200 (1938). A bare conspiracy allegation should not suffice to erect a barrier to examining the massive scope of plaintiffs' complaint and the inevitable discovery costs it would impose on defendants. Rather – just as the *in terrorem* effect of litigation was highly relevant to the 12(b)(6) inquiry in *Dura* – here it is appropriate to consider that this is a mega-lawsuit in which the purported plaintiff class is hundreds of millions of persons and businesses, and the defendants are practically an entire industry, and in which the defendants could easily incur tens of millions of dollars in discovery costs before having any opportunity to contest the validity of the claim on summary judgment.

B. Courts Should Construe Pleadings In Antitrust Cases In Light Of Substantive Antitrust Doctrine

The nature of the inference on which this case rests – an inference of conspiracy supported only by parallel conduct that is perfectly lawful standing alone – is also highly relevant to the degree of care with which the complaint should be scrutinized. This is not a case like *Swierkiewicz*, in which a court's acceptance of an inference of unlawful behavior permits a claim of discrimination against a single individual to proceed to discovery. Parallel competitive behavior by businesses is endemic in an industrial economy and it is almost always *desirable*

behavior that should be encouraged. Parallel behavior usually reflects nothing more than the fact that all of the firms in an industry operate in the same market environment; they are subject to the same regulatory constraints, purchase the same raw materials, and attempt to sell to the same customers. Parallel behavior is more frequently a hallmark of intense competition than of anticompetitive conspiracy; in highly competitive markets, any competitive strategy that proves to be successful will rapidly attract imitators. "No anticompetitive inference can be drawn from such copying, any more than such an inference can be drawn from the fact that almost all farmers use fertilizer * * *." 11 HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1821e, at 188 (2d ed. 2005).

That is true well beyond the telecommunications industry, the subject of this case. For example, pharmaceutical firms confront (i) pervasive, uniformly applied regulation; (ii) gatekeeper regulators who determine whether and how prescription pharmaceutical products will be used; and (iii) increasingly sophisticated third-party payors who impose similar requirements on all competitors. All of those factors reinforce other market forces that tend to lead to similar reactions by different firms. The cost of permitting vexatious litigation challenging such innocuous yet parallel conduct to proceed is very high. Accordingly, when plaintiffs seek to challenge such conduct as the product of conspiracy based on nothing but a conclusory inference of conspiracy, "a district court must retain the power to insist upon some specificity in pleading before allowing [such] a potentially massive factual controversy to proceed." *Associated Gen. Contractors*, 459 U.S. at 528 n.17.

Even though parallel behavior, standing alone, is very unlikely to manifest an anticompetitive agreement, it would be exceedingly difficult for any business to demonstrate that the parallel behavior *could not possibly* have been the result of an agreement or, as the Second Circuit put it, that "there is no set of facts that would permit a plaintiff to demonstrate that the particular set of parallelism asserted was the product of collu-

sion rather than coincidence." Pet. App. 25a. That task would be especially daunting in the motion-to-dismiss context, where the court's inquiry is largely constrained by the allegations that the *plaintiff* chooses to include in its complaint.

Conley warned against making "one misstep by [plaintiffs'] counsel * * * decisive to the outcome," 355 U.S. at 48, but it is no less true that one clever step by plaintiffs' counsel (such as adding a conclusory "conspiracy" allegation "upon information and belief" to an otherwise facially groundless complaint) should not be enough to force an entire industry to endure massive litigation with no real foundation. If plaintiffs are allowed to inflict large discovery costs on the basis of flawed inferences based on such flimsy allegations, the inevitable result will be a flood of meritless suits, and a very real risk that "mistaken inferences" will "chill the very conduct the antitrust laws are designed to protect." *Matsushita*, 475 U.S. at 594; see also *Monsanto*, 465 U.S. at 763 (permitting an inference of conspiracy from conduct that is as consistent with legitimate competition as with conspiracy "could deter or penalize perfectly legitimate conduct").

The Second Circuit believed that it was powerless to consider such factors, or the acknowledged risk that its ruling would encourage abusive litigation. For the reasons given above, that view is mistaken.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

ROBIN S. CONRAD
AMAR D. SARWAL
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20036
(202) 463-5337

MICHAEL FIELD ALTSCHUL
CTIA – The Wireless Association
1400 16th Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 785-0081

JAN S. AMUNDSON
QUENTIN RIEGEL
National Association of Manufacturers
1331 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 637-3000

PETER B. KENNEY, JR.
Northwest Airlines, Inc.
Department A1180
2700 Loan Oak Parkway
Eagan, MN 55121-1534
(612) 726-3663

ROY T. ENGLERT, JR.*
Counsel of Record
DONALD J. RUSSELL
MATTHEW R. SEGAL
Robbins, Russell, Englert Orseck & Untereiner LLP
1801 K Street, N.W., Suite 411
Washington, D.C. 20006
(202) 775-4500

JOHN T. WHATLEY
Alliance of Automobile Manufacturers
1401 H Street, N.W., Suite 900
Washington, D.C. 20005
(202) 326-5500

KEN KHOURY
GUY STEPHENSON
KATHRYN FEWELL
Weyerhaeuser Company
CH 1 J 28
33663 Weyerhaeuser Way
Federal Way, WA 98003
(253) 924-5091

RICKS P. FRAZIER
United Air Lines, Inc.
1200 E. Algonquin Rd.
Elk Grove Township, IL 60007
(847) 700-4466

MARK S. POPOFSKY
Kaye Scholer LLP
901 15th Street, N.W.
Washington, D.C. 20005
(202) 682-3500
Counsel for Pharmaceutical Research and Manufacturers of America

SAUL P MORGENSTERN
ROBERT GRASS
SHEFALI M. KOTHARI
Kaye Scholer LLP
425 Park Avenue
New York, NY 10022
(212) 836-8000
Counsel for Pharmaceutical Research and Manufacturers of America

AUGUST 2006

7166

No. 05-1126

Supreme Court, U.S.
FILED
AUG 25 2006
OFFICE OF THE CLERK

In The Supreme Court of the United States

BELL ATLANTIC CORPORATION, *ET AL.*,

Petitioners,

v.

WILLIAM TWOMBLY, *ET AL.*, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE COMMONWEALTH OF VIRGINIA AND 15 OTHER STATES AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

ROBERT F. MCDONNELL
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
Counsel of Record

STEPHEN R. MCCULLOUGH
Deputy State Solicitor General

WILLIAM C. MIMS
Chief Deputy Attorney General

SARAH OXENHAM ALLEN
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
(804) 786-2436
(804) 786-1991 (facsimile)

Counsel for the Commonwealth of Virginia

August 25, 2006

[Additional Counsel Listed On Inside Of Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TROY KING
Attorney General of the
State of Alabama
Office of the Attorney General
11 South Union Street
Montgomery, Alabama 36130
(334) 353-9782

JOHN SUTHERS
Attorney General of the
State of Colorado
1525 Sherman Street
Denver, Colorado 80203
(303) 866-4500

LAWRENCE G. WASDEN
Idaho Attorney General
Post Office Box 83720
Boise, Idaho 83720
(208) 334-2400

STEVE CARTER
Indiana Attorney General
ICG South – Fifth Floor
302 W. Washington Street
Indianapolis, Indiana 46204
(317) 232-6201

PHILL KLINE
Attorney General of the
State of Kansas
120 S.W. 10th Avenue
Topeka, Kansas 66612
(785) 296-2215

MICHAEL A. COX
Michigan Attorney General
Post Office Box 30212
Lansing, Michigan 48909
(517) 373-1110

JON BRUNING
Attorney General of the
State of Nebraska
Nebraska Dept. of Justice
Post Office Box 98920
Lincoln, Nebraska 68509
(402) 471-2644

ORVILLE B. FITCH II
Deputy Attorney General
Office of the Attorney General
33 Capitol Street
Concord, New Hampshire
03301
(603) 271-1238

WAYNE STENEHJEM
Attorney General of the
State of North Dakota
State Capitol
600 E. Boulevard Ave.
Bismarck, North Dakota
58505
(701) 328-2210

W.A. DREW EDMONDSON
Attorney General of Oklahoma
2300 N. Lincoln Boulevard,
Suite 112
Oklahoma City, Oklahoma
73105
(405) 521-3921

THOMAS W. CORBETT, JR.
Attorney General of
Pennsylvania
16th Floor, Strawberry Square
Harrisburg, Pennsylvania
17120
(717) 787-3391

PATRICK C. LYNCH
Attorney General of
Rhode Island
Department of
Attorney General
150 South Main Street
Providence, Rhode Island
02903
(401) 274-4400

LARRY LONG
Attorney General of
South Dakota
1302 East Highway 14,
Suite 1
Pierre, South Dakota 57501
(605) 773-3215

PAUL G. SUMMERS
Attorney General of
Tennessee
Post Office Box 20207
Nashville, Tennessee 37202
(615) 741-5860

MARK L. SHURTLEFF
Utah Attorney General
Utah State Capitol Complex
East Office Building,
Suite 320
Salt Lake City, Utah 84114
(801) 538-9600

QUESTION PRESENTED

Whether a complaint states a claim under Section 1 of the Sherman Act, 15 U.S.C. § 1, if it alleges that the defendants engaged in parallel conduct and adds a bald assertion that the defendants were participants in a "conspiracy," without any allegations that, if later proved true, would establish the existence of a conspiracy under the applicable legal standard.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTERESTS OF AMICI	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. UNDER THE PLAIN TEXT OF RULE 8 OF THE FEDERAL RULES OF CIVIL PROCEDURE, THE PLAINTIFFS' ALLEGATIONS CANNOT SURVIVE A MOTION TO DISMISS	4
A. Rule 8 Requires a Showing That the Plaintiff "Is Entitled To Relief" – and Without Factual Allegations that Show Either Behavior Contrary to the Defendants' Independent Self-Interest or Factual Assertions Directly Showing the Existence of a Conspiracy, a Plaintiff Fails to Show He is Entitled to Relief	4
B. The Complaint at Issue Fails to Provide Fair Notice to Petitioners	7
C. Allowing Insubstantial Pleadings to Go Forward is Wasteful and Expensive for Both Defendants and the Courts	8
D. This Court's Decisions Have Not Addressed the Allegations Required in "Parallel Conduct" Cases	9
II. REQUIRING A MINIMUM OF DETAIL IN A COMPLAINT TO SHOW THE EXISTENCE OF A CONSPIRACY WILL NOT HARM STATE ANTITRUST ENFORCEMENT	13
CONCLUSION	17

TABLE OF AUTHORITIES

Page

CASES

Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983) 7

In re Baby Food Antitrust Litig., 166 F.3d 112 (3rd Cir. 1999) 4, 9

Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, 203 F.3d 1028 (8th Cir. 2000) 4

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993) 14

Cayman Exploration Corp. v. United Gas Pipe Line Co., 873 F.2d 1357 (10th Cir. 1989) 15

Conley v. Gibson, 355 U.S. 41 (1957) 7, 12

Davis v. Passman, 442 U.S. 228 (1979) 8

DM Research, Inc. v. College of American Pathologists, 170 F.3d 53 (1st Cir. 1999) 15

Dura Pharms., Inc. v. Broudo, 544 U.S. 336 (2005) 5, 12

Heart Disease Research Found. v. General Motors Corp., 463 F.2d 98 (2nd Cir. 1972) 15

Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738 (1976) 10

TABLE OF AUTHORITIES – Continued

Page

Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993) 11

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 6

McLain v. Real Estate Bd. of New Orleans, 444 U.S. 232 (1980) 10

Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984) 5

Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464 (1962) 10, 11

Radovich v. National Football League, 352 U.S. 445 (1957) 11

Russell v. United States, 369 U.S. 749 (1962) 7

Swierkiewicz v. Sorema N. A., 534 U.S. 506 (2002) 12

Todd v. Exxon Corp., 275 F.3d 191 (2nd Cir. 2001) 4

Twombly v. Bell Atlantic Corp., 313 F. Supp. 2d 174 (S.D.N.Y. 2003) (*Twombly I*) 8

Twombly v. Bell Atlantic Corp., 425 F.3d 99 (2nd Cir. 2005) (*Twombly II*) 5, 8, 9

United States v. Employing Plasterers' Ass'n, 347 U.S. 186 (1954) 10

Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) 12, 16

TABLE OF AUTHORITIES – Continued

Page

Wallace v. Bank of Bartlett,
55 F.3d 1166 (6th Cir. 1995) 5

STATUTES

15 U.S.C. § 1 14

15 U.S.C. § 2 14

15 U.S.C. §§ 1-7 13

42 U.S.C. § 1983 11

RULES

Fed. R. Civ. P. 8 ..... 2, 4, 5

Fed. R. Civ. P. 8(a)(2) 4

Fed. R. Civ. P. 8(f) 9

OTHER AUTHORITIES

Antitrust Advisor (4th ed. Irving Scher, ed. 2005) 4

Dina E. Boghdady,
Verizon Pursues Local Cable Franchises,
Wash. Post, July 19, 2005, D4 13

Corporate Counsel's Antitrust Deskbook (2005) 4

6 James W. Moore, Patrick E. Higginbotham,
Moore's Federal Practice (3d ed. 2006) 8

Office of Management and Budget, FY06 Budget Priorities, Promoting Economic Opportunity and Ownership, available at http://www.whitehouse.gov/omb/budget/fy2006/promoting.html 1

TABLE OF AUTHORITIES – Continued

Page

Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655 (1962) 14

5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* (3d ed. 2004). 4

INTERESTS OF AMICI

The Commonwealth of Virginia and the States of Alabama, Colorado, Idaho, Indiana, Kansas, Michigan, Nebraska, New Hampshire, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, and Utah ("States") have two distinct interests. First, the States have a critical interest in reducing costs associated with unfounded lawsuits. Businesses in the United States face the highest legal costs in the industrialized world.[1] Antitrust litigation is particularly expensive. A significant reason for the costs associated with antitrust is the expense of conducting discovery. The pleading standard articulated by the Second Circuit essentially eliminates the use of motions to dismiss in cases involving parallel conduct. By guaranteeing discovery in such cases, the standard adopted by the court below will encourage plaintiffs to file first and investigate later. Given the staggering costs associated with discovery in such lawsuits, businesses will be prompted to settle, even at a high cost, to avoid even higher discovery costs. These expenses ultimately will be passed on to consumers. Furthermore, the States are among the chief enforcers of antitrust law. As such, they have a compelling interest in ensuring sound antitrust jurisprudence.

Second, the States have an interest in ensuring that minimal pleading standards are maintained in the federal courts. States and state officials must constantly defend a

---

[1] According to the Office of Management and Budget, "[t]he costs of litigation per person in the United States are far higher than in any other major industrialized nation in the world. Lawsuit costs have risen substantially over the past several decades, and a significant part of the costs go to paying lawyers' fees and transaction costs – not to compensating the injured parties." Available at http://www.whitehouse.gov/omb/budget/fy2006/promoting.html.

host of complex cases in federal courts. Although the Second Circuit's decision seems to be limited to the narrow area of antitrust law, lower courts will be tempted to extend its rationale to a variety of other areas including civil rights, election law, and environmental matters. If allowed to stand, the Second Circuit's decision, in the long term, risks a weakening of the already low threshold for notice pleading and a corresponding increase in expenditures of limited taxpayer funds defending needless litigation.

By filing this Brief in Support of the Petitioners, the States urge this Court to confirm that the rules of pleading are not an invitation for filing lawsuits that fail to state a legal wrong or for embarking on "fishing expeditions." Overturning the Second Circuit's decision will not hamper the pursuit of meritorious claims that are based upon provable allegations of fact. Reversing the Second Circuit will ensure that the States, businesses, and the federal courts are not burdened with lawsuits based on speculation and innuendo.

SUMMARY OF ARGUMENT

In urging this Court to reverse the Second Circuit, the States make two points.

First, under the plain text of Rule 8 of the Federal Rules of Civil Procedure, the Respondents' allegations cannot survive a motion to dismiss. A complaint that does not allege illegal conduct falls short of the minimum required by the Rule. Therefore, requiring a plaintiff to allege facts that demonstrate a violation of the law, *i.e.*, that the plaintiff is entitled to relief, is fully consistent with the text and spirit of Rule 8. That showing can be made by alleging either facts that establish that the defendants' conduct was contrary to

their own independent self-interest or threshold facts regarding the existence of the conspiracy. Furthermore, a conclusory allegation of a conspiracy does not provide a defendant with "fair notice." A defendant is left to guess which of the thousands of employees conspired, when, and with whom. Without such pleading requirements, there is no incentive to base such lawsuits upon fact. The enormous costs in time and money associated with antitrust discovery will force many defendants to settle these lawsuits, even when they have no merit. Imposing extensive costs on businesses and consumers in these circumstances does not comport with the "substantial justice" that Rule 8 demands from all pleadings.

Second, requiring a minimum level of factual detail in a complaint to show the existence of a conspiracy will not harm state antitrust enforcement. While the States recognize that overly stringent pleading requirements are undesirable, parallel conduct cases require something more than bald assertions that hint at the possibility of illegal behavior. State antitrust enforcement remains effective in those circuits that require something more than mere allegations of illegal conduct coupled with a conclusory allegation of a conspiracy.

ARGUMENT

I. UNDER THE PLAIN TEXT OF RULE 8 OF THE FEDERAL RULES OF CIVIL PROCEDURE, THE PLAINTIFFS' ALLEGATIONS CANNOT SURVIVE A MOTION TO DISMISS.

A. Rule 8 Requires a Showing That the Plaintiff "Is Entitled To Relief" – and Without Factual Allegations that Show Either Behavior Contrary to the Defendants' Independent Self-Interest or Factual Assertions Directly Showing the Existence of a Conspiracy, a Plaintiff Fails to Show He is Entitled to Relief.

Rule 8 of the Federal Rules of Civil Procedure requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Obviously, actions that are more complex require more complex pleadings to show the plaintiff is entitled to relief. Indeed, "there is no heightened pleading standard in antitrust cases. On the other hand, the complexity of most antitrust cases inevitably leads to lengthier and more detailed pleadings." 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1228 (3d ed. 2004). Thus, in antitrust cases involving allegations of parallel conduct, plaintiffs must allege and prove "plus factors" – circumstances that, in combination with parallel behavior, show illegal conduct.[2] *See Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2nd Cir. 2001); *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1033 (8th Cir. 2000); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 122 (3rd Cir.

[2] For a discussion of these "plus factors," *see Antitrust Advisor* § 1:8 (4th ed. Irving Scher, ed. 2005). *See also Corporate Counsel's Antitrust Deskbook* § 1.029-1.050 (2005).

1999); *Wallace v. Bank of Bartlett*, 55 F.3d 1166, 1168 (6th Cir. 1995). The crux of such a requirement is that the plaintiff must show that the defendant acted in a fashion that is contrary to independent self-interest.

However, the lower court's decision abolishes the need to allege such facts. *Twombly v. Bell Atlantic Corp.*, 425 F.3d 99, 114 (2nd Cir. 2005) (*Twombly II*). Since a plaintiff in an antitrust case could not rest his case without either (1) establishing conduct contrary to a defendant's independent self-interest, which would circumstantially show the existence of a conspiracy, or (2) minimal facts directly showing the existence of a conspiracy, a pleading that proceeds to discovery without such allegations fails to show the pleader is entitled to relief.

By permitting a plaintiff to proceed to discovery with allegations that do not show any illegal conduct, the Second Circuit set a floor well beneath the minimum required by the plain text of Rule 8. *Cf. Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 346 (2005) (plaintiff claiming securities fraud must allege the elements of a viable cause of action to satisfy Rule 8(a)(2)). This is not a heightened pleading standard for antitrust cases. Rather, it is a standard inherent in the nature of a parallel conduct case, which must be premised on something other than legal conduct. The Respondents' allegations do not tend to exclude independent, self-interested conduct as an explanation for the defendants' parallel behavior. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984) (antitrust plaintiff must provide "evidence that tends to exclude the possibility of independent action by the [defendants]"). The complaint alleges: (1) that the defendants have failed to compete with each other; (2) that they have sought to thwart competing local exchange carriers

(CLECs); (3) that the defendants have had opportunities to communicate with each other; and (4) that various quotes gleaned from Congressmen or from an executive for Qwest Communications indicate conspiratorial behavior. Even accepting the Respondents' *factual* allegations as true, the facts alleged fail to raise any inference of conspiratorial conduct.

Indeed, similar factual assertions could be raised against much permissible economic activity. For example, a complaint might allege that law firms in a given area have opportunities to communicate through bar associations; that the law firms often offer suspiciously comparable pay and benefits packages for an entering class of associates; that their billable hour structure is similar; that the firms have failed to open satellite offices in certain cities, even though they have an arguable interest in doing so; and that their conduct has manifested hostility towards new law firms. Nor would it be especially difficult to locate or generate quotes that arguably hint at anti-competitive conduct. Such assertions, similar to those in the Respondent's complaint, would not show any illegal behavior.

"Antitrust law limits the range of permissible inferences from ambiguous evidence." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). Furthermore, an inference of conspiracy will not arise from "conduct that is as consistent with permissible competition as with illegal conspiracy." *Id.* Therefore, requiring a plaintiff to allege a viable theory of recovery from the outset does not impose an excessive burden. A court "must assume that the [plaintiff] can prove the facts alleged in its amended complaint. It is not, however, proper to assume that the [plaintiff] can prove facts that it

has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged." *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters,* 459 U.S. 519, 526 (1983). The district court properly dismissed the amended complaint because the plaintiffs did not allege any facts showing the existence of illegal conduct.

B. The Complaint at Issue Fails to Provide Fair Notice to Petitioners.

While the federal rules of pleading are liberal, they do require a plaintiff to provide a defendant with "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Whether in civil or criminal cases, a bedrock principle is the requirement that a complaint or indictment sufficiently inform the defendant of what he must be prepared to meet. *Id. See also Russell v. United States*, 369 U.S. 749, 763-64 (1962).

The Respondents' allegations in this case fail to provide even a minimum foundation of fact to demonstrate the existence of a conspiracy. In their complaint, the Respondents allege that *every* incumbent local exchange carrier (ILEC) has conspired "[b]eginning at least as early as February 6, 1996" to the present day. J.A. at 30, ¶ 64. Such a pleading, which essentially alleges that all defendants conspired all the time, neither provides the defendants with any reasonable notice of the claim, nor does it show that the allegations rest upon any factual ground. As the district court correctly noted, "there is simply no way to defend against such a claim without having some idea of how and why the defendants are

alleged to have conspired." *Twombly v. Bell Atlantic Corp.*, 313 F. Supp. 2d 174, 181 (S.D.N.Y. 2003) (*Twombly I*).

"It is not enough to indicate merely that the plaintiff has a grievance but sufficient detail must be given so that the defendant, and the court, can obtain a fair idea of what the plaintiff is complaining, and can see that there is some legal basis for recovery." *Davis v. Passman,* 442 U.S. 228, 238 n.15 (1979). Respondents' amended complaint fails this basic test.

C. Allowing Insubstantial Pleadings to Go Forward is Wasteful and Expensive for Both Defendants and the Courts.

The Second Circuit held that a plaintiff need not plead plus factors in parallel conduct cases and that a complaint cannot be dismissed unless "no set of facts [exists] that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence." *Twombly II*, 425 F.3d at 114. If this standard is affirmed, motions to dismiss even the most groundless antitrust cases will be denied. A plaintiff would usually be able to argue that there may be such a set of facts out there that, though not alleged, might be uncovered. Thus, groundless cases ineluctably will be propeled into the discovery phase. Such exercises in futility place an unnecessary burden on already overtaxed district courts to hear the inevitable discovery disputes that arise in cases of this magnitude.

The costs associated with discovery in antitrust cases, as the Second Circuit recognized, are "colossal." *Twombly II*, 425 F.3d at 117. *See also* 6 James W. Moore & Patrick E. Higginbotham, *Moore's Federal Practice* ¶ 26.46[1], at 26-146.24 (3d ed. 2006) (describing antitrust discovery as a

"bottomless pit"). *Cf. In re Baby Food Antitrust Litig.*, 166 F.3d at 117 (discovery process lasted three years). Due to the nature of antitrust litigation, countless managers and nearly every document and email in the vast corporate inventory might be relevant or might lead to relevant evidence and thus become a subject of discovery. The Second Circuit acknowledged that its holding would "likely lead defendants and plaintiffs to settle what would ultimately be shown to be meritless claims" and, further, that "the success of such meritless claims encourages others to be brought." *Twombly II*, 425 F.3d at 117. This Court should not adopt a standard that results in staggering costs on business and consumers and imposes unnecessary burdens on the judiciary, all without any corresponding benefit to the marketplace.

The Second Circuit erroneously believed its hands were tied by the Rules of Civil Procedure. However, Federal Rule of Civil Procedure 8(f) provides that "all pleadings shall be so construed as to do substantial justice." Requiring a plaintiff to (1) provide more than conclusory allegations of wrongdoing at the outset and (2) allege a minimum of fact to show a likelihood that the defendants conspired, – that is to say, plead the basic elements of an antitrust case – does not impose an unduly rigorous standard. Moreover, such a standard comports with "substantial justice."

D. This Court's Decisions Have Not Addressed the Allegations Required in "Parallel Conduct" Cases.

Cases addressing pleading requirements are legion. However, an examination of this Court's decisions shows that (1) the pleadings at issue all stated viable causes of

action, rather than the *mere possibility* of a cause of action, and (2) the allegations sufficed to provide notice to a defendant. Moreover, this Court has never addressed the threshold minimum showing that must be made in a "parallel conduct" case.

In the antitrust case *McLain v. Real Estate Bd. of New Orleans,* 444 U.S. 232 (1980), the plaintiffs alleged that real estate firms and trade associations in Louisiana had conspired to fix commission rates, split fees, and suppress market information. *Id.* at 235. The issue on appeal centered on the allegations necessary to establish a "nexus between the defendants' activity and interstate commerce." *Id.* at 246. The plaintiffs set forth detailed allegations showing the interstate impact of the transactions, including the fact that financing and insurance for the transactions were obtained outside of Louisiana, that the transactions involved persons moving in and out of Louisiana, and the impact of the alleged conspiracy on Veterans' Administration-insured loans. *Id.* at 235-37. The Court concluded that the plaintiffs' allegations established federal jurisdiction. *Id.* at 245. *See also Hospital Bldg. Co. v. Trustees of Rex Hosp.,* 425 U.S. 738, 744 (1976) (allegations in complaint sufficed to establish a substantial effect on interstate commerce for purposes of the Sherman Antitrust Act); *United States v. Employing Plasterers' Ass'n,* 347 U.S. 186, 189 (1954) (same).

In *Poller v. Columbia Broad. Sys., Inc.,* 368 U.S. 464, 466 (1962), the Court concluded that the case should not have been dismissed at the summary judgment stage. In that case, the plaintiff alleged that in 1954, several specific individuals conspired to drive a television station out of business to protect its VHF format from the threat posed by UHF broadcasting. *Id.* at 465-67. Those allegations contrasted markedly with the allegations in the case

at hand. The plaintiff in *Poller* detailed specific conduct by specific actors within a specified time frame. *Id.* at 466.

In *Radovich v. National Football League*, 352 U.S. 445, 453 (1957), the Court held that the complaint filed by a blacklisted football player sufficed to avoid dismissal. The complaint was premised on the use of a specific standard contract by the National Football League that prevented players from freely transferring to other clubs or leagues. *Id.* at 449. The plaintiff claimed that in 1948, the National Football League communicated with the San Francisco Clippers to prevent him from joining that club. *Id.* at 448-49. These allegations were precise enough to inform the defendant what conduct was being alleged, when and with whom, so as to enable the defendant to mount a defense.

More recently, in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 165 (1993), an action under 42 U.S.C. § 1983, the plaintiffs alleged that law enforcement officers violated their constitutional rights. Specifically, the plaintiffs complained of two discrete searches involving a forcible entry into their homes that occurred after the police detected odors associated with drug manufacturing. *Id.* This Court held it was error to impose a heightened pleading standard in such cases. *Id.* at 168. *Leatherman* offers the Respondents no support for two reasons. First, the allegations in *Leatherman* were sufficient to show that the conduct at stake was illegal and, second, the allegations were specific enough to allow defendants to know when and where the alleged conduct occurred. While there is no heightened pleading standard in parallel conduct cases, the very nature of the underlying wrong requires a plaintiff's allegations to show that there has been something other than simply economically rational behavior.

The lower court also relied upon *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002). In that case, the plaintiff "detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination." *Id.* at 514. This Court found these allegations sufficed to "give respondent fair notice of what petitioner's claims are and the grounds upon which they rest." *Id.* Again, there can be no comparison to the conclusory assertion of a conspiracy in this case.

Although "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *Conley*, 355 U.S. at 45-46, such a rule presupposes that the plaintiff indeed has set forth a valid claim. In the context of an allegation of conspiracy involving parallel conduct, a valid claim must include a showing that the defendant acted contrary to independent self-interest or some modicum of fact directly proving the existence of a conspiracy. In other words, a complaint founded on parallel conduct must clearly and unambiguously allege a wrong, either circumstantially or directly, rather than the mere possibility of a wrong.

This Court has not hesitated, even under the liberal notice pleading standard, to dismiss cases when they failed to state a valid claim. *See Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 412 (2004) (complaint alleging telephone companies' failure to share their network dismissed for failing to state a claim under antitrust law); *Dura Pharms.*, 544 U.S. at 347 (Complaint should have been dismissed because plaintiff failed to plead the elements of a cause of action

and because pleading did not "provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind.").

II. REQUIRING A MINIMUM OF DETAIL IN A COMPLAINT TO SHOW THE EXISTENCE OF A CONSPIRACY WILL NOT HARM STATE ANTITRUST ENFORCEMENT.

Parallel conduct is a common phenomenon: gas stations raise and lower their prices based on the actions of their nearby competitors; and competing law firms set similar salaries for an entering class of associates, not because they are a part of an elaborate plot but because they have responded independently to obvious economic incentives. Without circumstantial evidence of a conspiracy, or allegations showing direct evidence of a conspiracy, a complaint relying on parallel conduct fails to allege illegal behavior. Requiring that the plaintiff in conscious parallelism cases allege either conduct that is contrary to independent self-interest, or minimal facts demonstrating directly the existence of an actual conspiracy, will not hamper state enforcement of antitrust cases.

First, the Sherman Antitrust Act, 15 U.S.C. §§ 1-7, does not prohibit unilateral conduct.[3] Conscious parallelism is the

[3] In this instance, the defendant telephone companies face competition from new telephone startup companies, from cellular telephones and from cable and internet based alternatives. Given these challenges and the limitations all economic actors face in human and financial capital, the telephone companies rationally chose to address the competition in these areas before straying into traditional telephone service outside of their home market. *See* Dina E. Boghdady, *Verizon Pursues Local Cable Franchises*, *Wash. Post*, July 19, 2005 at D4. Furthermore, telephone companies have an incentive unilaterally to

(Continued on following page)

"process, not itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, competitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993). Conscious parallelism is not unlawful because the Sherman Antitrust Act does not prohibit unilateral behavior. *Id.* (conscious parallelism is "not in itself unlawful."). Rather the Act prohibits "combination[s]" and "conspirac[ies]," 15 U.S.C. § 1, and proscribes "a combination or conspiracy to monopolize." *Id.* at § 2. "Conscious parallelism is never meaningful by itself, but always assumes whatever significance it might have from additional facts." Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 658 (1962).

Second, States do not file complaints such as the one at issue in the case at bar. As the chief law enforcement officials of their States, State Attorneys General take seriously their obligation to investigate thoroughly suspected violations of antitrust law prior to the filing of a complaint. State Attorneys General fulfill their responsibility to investigate suspected antitrust violations prior to filing suit by issuing pre-complaint investigative subpoenas – commonly referred to as Civil Investigative Demands ("CIDs") in most states – to individuals and companies suspected of engaging in unlawful activity. CIDs allow State Attorneys General to compel the production of

---

avoid entering the market of a rival because, obviously, any such entry would likely trigger a retaliatory market entry.

documents and testimony from suspected wrongdoers. State Attorneys General use the evidence obtained through the CID process to support civil actions they file on behalf of their States. There is thus no need for a State to file complaints that lack sufficient detail showing the evidence of a conspiracy.

Nor is there any indication that state enforcement of antitrust has been hampered in those circuits that require allegations of plus factors from the outset. *See DM Research, Inc. v. College of American Pathologists*, 170 F.3d 53, 56 (1st Cir. 1999) (requiring plaintiff to allege "plus factors" or other facts in support of antitrust conspiracy claim); *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1361 (10th Cir. 1989) (dismissing complaint for failing to allege any facts that would support an inference of conspiracy). Nor is there any evidence that antitrust enforcement was unduly burdened prior to the holding below when the Second Circuit adhered to a requirement that "a bare bones statement of conspiracy or of injury under the anti-trust laws without any supporting facts permits dismissal" of the complaint. *See Heart Disease Research Found. v. General Motors Corp.*, 463 F.2d 98, 100 (2nd Cir. 1972).

Third, if this Court endorses the Second Circuit's overly permissive pleading standard, plaintiffs, knowing that they will at least proceed to the discovery phase, will have a powerful incentive to file more antitrust actions of questionable merit. This expansion of private antitrust litigation may have the unintended consequence of undermining well-considered state and federal policies in regulated fields like telecommunications. For example, state and federal regulatory agencies oversee the telecommunications industry and seek, *inter alia*, to facilitate

the transition of local telephone markets to competition. Of course, state and federal agencies provide similar oversight in many other industries. In *Trinko*, this Court specifically highlighted the importance of such regulatory structures in deterring anticompetitive conduct. 540 U.S. at 412.

Private antitrust enforcement operates in inherent tension with these regulatory structures. State and federal agencies have acquired a unique regulatory expertise in highly technical areas, which is not typically found in courts hearing private antitrust actions. Furthermore, regulatory policies and decisions may conflict with court decisions, creating uncertainty in those areas. Finally, regulatory agencies operate in the public interest, whereas private litigants seek to vindicate only their own narrower concerns.

In light of these tensions, the States caution this Court to be mindful of the effect upon regulatory systems that would be triggered by a significant increase in private antitrust enforcement. The consequences of unnecessary and unanticipated changes in the reach of antitrust law are difficult to predict. These uncertainties further counsel against the adoption of the ill-advised decision of the Second Circuit.

Finally, States also have a compelling interest in protecting their citizens, corporate or otherwise, from the prospect of unfounded costly lawsuits without any corresponding gain in marketplace competition.

CONCLUSION

For the reasons stated above, in the Petitioners' Brief, and in the Briefs of the other Amici supporting the Petitioners, the judgment of the United States Court of Appeals for the Second Circuit should be REVERSED.

Respectfully submitted,

ROBERT F. MCDONNELL
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
Counsel of Record

STEPHEN R. MCCULLOUGH
Deputy State Solicitor General

August 25, 2006

WILLIAM C. MIMS
Chief Deputy Attorney General

SARAH OXENHAM ALLEN
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
(804) 786-2436
(804) 786-1991 (facsimile)

Counsel for the Commonwealth of Virginia

[Additional Counsel Listed On Inside Of Cover]

715B

Supreme Court, U.S.
FILED
AUG 25 2006
OFFICE OF THE CLERK

No. 05-1126

IN THE

Supreme Court of the United States

BELL ATLANTIC CORPORATION, *ET AL.*,
Petitioners,

v.

WILLIAM TWOMBLY, *ET AL.*, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* ECONOMISTS IN SUPPORT OF PETITIONERS

R. HEWITT PATE
Counsel of Record
PAUL S. HAYES
HUNTON & WILLIAMS LLP
1900 K Street, N.W.
Washington D.C. 20006
(202) 955-1500

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether a complaint states a claim under Section 1 of the Sherman Act, 15 U.S.C. § 1, if it alleges that the defendants engaged in parallel conduct and adds an unadorned assertion that defendants were participants in a "conspiracy," without alleging any facts that, if later proved true, would establish the existence of a conspiracy under the applicable legal standards.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF THE *AMICI CURIAE*	1
PRELIMINARY STATEMENT	2
INTRODUCTION AND SUMMARY	3
ARGUMENT	7
I. PARALLEL BEHAVIOR AMONG NON-CONSPIRING FIRMS IN THE SAME INDUSTRY IS NORMAL AND COMMON	7
II. THE "PARALLEL BEHAVIOR IS ENOUGH" STANDARD WOULD PERMIT CLAIMS OF CONSPIRACY TO RESTRAIN TRADE AGAINST ALMOST ALL FIRMS	9
III. THE "PARALLEL BEHAVIOR IS ENOUGH" STANDARD POSES A SIGNIFICANT ISSUE OF JUDICIAL AND PUBLIC POLICY	11
IV. THE "PARALLEL BEHAVIOR IS ENOUGH" STANDARD WOULD RESULT IN GREATER EXPENDITURE OF JUDICIAL AND BUSINESS RESOURCES	13
V. THE "PARALLEL BEHAVIOR IS ENOUGH" STANDARD WOULD RESULT IN REDUCED ECONOMIC EFFICIENCY AS FIRMS LIMIT EFFICIENT PARALLEL BEHAVIOR	14

TABLE OF CONTENTS—Continued

Page

VI. THE "PLUS FACTOR" STANDARD STRIKES A REASONABLE BALANCE BETWEEN DETECTING AND DETERRING CONSPIRACIES AND LIMITING THE INCENTIVES OF FIRMS TO ENGAGE IN NORMAL PRO-COMPETITIVE BEHAVIOR 18

CONCLUSION 19

APPENDIX 1a

TABLE OF AUTHORITIES

CASES — Page

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993) 9, 16

Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996) 12

In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995) 12

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 9, 16, 19

Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984) 9, 16

Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537 (1954) 9, 16

Twombly v. Bell Atlantic Corp., 313 F. Supp. 2d 174 (S.D.N.Y. 2003), *rev'd* 425 F.3d 99 (2d Cir. 2005) 3, 4, 5

Twombly v. Bell Atlantic Corp., 425 F.3d 99 (2d Cir. 2005) ..... *passim*

STATUTES

Sherman Act, 15 U.S.C. § 1 ..... *passim*

OTHER MATERIALS

William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & ECON. 247 (1985) 12

S. Bikhchandani, D. Hirshleifer & I. Welch, *Learning from the Behavior of Others: Conformity, Fads, and Informational Cascades*, 12 J. ECON. PERSP. 3 (1998) 8

Dennis W. Carlton & Jeffrey M. Perloff, MODERN INDUSTRIAL ORGANIZATION (4th ed. 2005) 7, 15

Boyan Jovanovic & Glenn Macdonald, *Competitive Diffusion*, 102 J. POL. ECON. 1 (1994) 9

TABLE OF AUTHORITIES—Continued

Page

T. Kauper & E. Snyder, *An Inquiry into the Efficiency of Private Antitrust Enforcement*, 74 GEO. L. REV. 1163 (1986) 12

Marvin Lieberman & Shigeru Asaba, *Why do Firms Imitate Each Other*, 31 ACADEMY MGMT REV. 2 (2006) 8

N. Gregory Mankiw, PRINCIPLES OF MICRO-ECONOMICS (3d ed. 2004) 7

National Economic Research Associates, *Statistical Analysis of Private Antitrust Enforcement, Final Report* (1979) 12

R. Nelson & S. G. Winter, AN EVOLUTIONARY THEORY OF ECONOMIC CHANGE (1982) 9

Pet. for a Writ of Certiorari, *Bell Atlantic Corp. v. Twombly* (No. 05-1126) 3

Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365 (1970) .. 12

Jan Rivkin, *Imitation of Complex Strategies*, 46 MGMT SCI. 6 (2000) 9

Paul A. Samuelson & William D. Nordhaus, ECONOMICS (18th ed. 2005) 5, 7, 15

D. Scharfstein & J.C. Stein, *Herd Behavior and Investment*, 80 AMER. ECON. REV. 3 (1990) 8

Paul Segerstrom, *Innovation, Imitation and Economic Growth*, 99 J. POL. ECON. 4 (1991) 9

Adam Smith, THE WEALTH OF NATIONS (Modern Library 1994) 11

E. Snyder & T. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV. 551 (1991) 12

W. Kip Viscusi, Joseph E. Harrington, Jr. & John M. Vernon, ECONOMICS OF REGULATION & ANTITRUST (4th ed. 2005) 11

IN THE

Supreme Court of the United States

No. 05-1126

BELL ATLANTIC CORPORATION, *ET AL.*,
Petitioners,

v.

WILLIAM TWOMBLY, *ET AL.*, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* ECONOMISTS IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*[1]

Amici are professors and scholars who teach and write on economics and, in particular, on the economics of industrial organization and antitrust policy. They include William Baumol, Michael Boskin, Robert Crandall, Kenneth Elzinga, David S. Evans, Gerald Faulhaber, Franklin Fisher, Luke

[1] The parties have consented to the submission of this brief and their letters of consent have been filed with the Clerk of this Court. This brief was not written in whole or in part by counsel for a party. No person or entity other than *amici* and their counsel made any monetary contribution to the preparation or submission of this brief. *Amici* and their counsel were not compensated in any way.

Froeb, Richard Gilbert, Paul Joskow, Michael Katz, Paul Milgrom, Thomas Moore, Janusz Ordover, Robert Pindyck, Robert Porter, Frederic Scherer, Richard Schmalensee, Marius Schwartz, David Sibley, Vernon Smith, Edward Snyder, Michael Spence, Pablo Spiller, Alan Sykes, David Teece, and Michael Whinston. A summary with titles and affiliations appears in the Appendix at the end of this brief. *Amici* file solely as individuals and not on behalf of any institutions with which they are affiliated. *Amici* have not been retained by any party with regard to this action.

PRELIMINARY STATEMENT

Two or more firms, selling in the same market, price their product "in similar ways" over time (or otherwise act similarly). Is that fact, together with a claim that the sellers conspired to fix prices (or agreed on some other dimension of competition), enough for a plaintiff to survive a motion to dismiss and set the wheels of litigation in motion under Section 1 of the Sherman Act, at least until summary judgment?

As we read the Second Circuit's decision, the answer is "yes, that is enough." This court of appeals decided that rivals acting in parallel in a manner that would be illegal if the result of conspiracy, together with an unsupported assertion of conspiracy, was sufficient to survive a motion to dismiss. Parallel behavior in this case concerned ***not*** taking a particular business action, in particular ***not*** entering certain geographic markets. The Second Circuit's decision therefore pertains to situations in which two or more firms, similarly, act or do not act.

Parallel behavior is a common feature of the dynamic competitive market processes. Market forces such as demand and supply shifts, changes in consumer preferences, and technological change move equilibrium prices up or down, make new product features more or less attractive, and make

particular geographic markets more or less appealing. The efficient response to these market forces is usually for firms to "behave in similar ways" including taking or not taking similar actions. Firms would, at the margin, be discouraged from responding efficiently to market signals in ways that might seem to be mimicking the conduct of rivals if they faced the prospect that actions similar to those taken by competitors could support at least the discovery phase of antitrust claims filed by various parties.

The undersigned economists believe the Second Circuit has taken antitrust enforcement in a misguided direction by adopting its "parallel behavior is enough" standard and in failing to require that a complaint contain facts sufficient to support an inference of conspiracy. This standard would impose direct costs on business firms (in the form of diverted management time) and deadweight costs on the economy (through resources used up in rent-seeking litigation). More significantly, in our view, pricing, entry, marketing, and other business decisions would be colored by a dismissal rule that, in effect, opens U.S. businesses to unsubstantiated allegations of conspiracy to restrain trade.

INTRODUCTION AND SUMMARY

This matter poses two alternative standards for allowing a claim of conspiracy in restraint of trade in violation of Section 1 of the Sherman Act to go forward.

The first is the one adopted by the district court in *Twombly v. Bell Atlantic Corp.*, 313 F. Supp. 2d 174 (S.D.N.Y. 2003), *rev'd* 425 F.3d 99 (2d Cir. 2005), and applied, as we understand it, by the Courts of Appeals for the First, Sixth, and Tenth Circuits: a claim of conspiracy can survive a motion to dismiss only if the allegations in the complaint, if proven to be true, tend to exclude the possibility that the claimed conspirators acted independently. (*See* Pet. for a Writ of Cert., *Bell Atlantic Corp. v. Twombly* (No. 05-

1126), at 19-20.) The fact of parallel behavior, standing alone, does not tend to exclude the possibility of independent action: firms that compete with one another often behave like one another in at least some respects. Therefore, under this standard, a claim can proceed only if there is something more than parallel behavior, requiring what is sometimes called "plus factors." Applying this "plus factor" standard the district court dismissed the plaintiffs' case because the court could not infer a conspiracy from the allegations in the complaint. *See Twombly*, 313 F. Supp. 2d at 189 ("The allegations of plaintiffs' complaint provide no reason to believe that defendants' parallel conduct was reflective of any agreement. The complaint therefore alleges nothing more than parallel conduct that appears to accord with the individual economic interests of the alleged conspirators.").

The second is the one adopted by the Second Circuit (and by no other court of appeals to our knowledge): a claim can proceed based on allegations of parallel behavior and an assertion that this parallel behavior is the result of conspiracy. *See Twombly v. Bell Atlantic Corp.*, 425 F.3d 99, 114 (2d Cir. 2005) ("But plus factors are not required to be pleaded to permit an antitrust claim based on parallel conduct to survive dismissal."). To do otherwise, reasoned the Second Circuit, "a court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence." *Id.* It is hard to imagine a court being able to reach such a conclusion in a real case. And, applying this "parallel behavior is enough" standard, the Second Circuit reversed the dismissal without examining, for all intents and purposes, whether the facts alleged supported to any extent an inference of conspiracy.

The observation that the defendants engage in parallel behavior is not a sound basis on which to infer collective conduct. The district court reasoned correctly that "parallel action is a common and often legitimate phenomenon, be-

cause similar market actors with similar information and economic interests will often reach the same business decisions." *Twombly*, 313 F. Supp. 2d at 179. Economic analysis supports this: competing firms often act similarly because they respond to the same demand and supply forces.[2] The Second Circuit's reasoning, on the other hand, could sustain a conspiracy claim against thousands of farmers who receive the same price for their wheat (or who decide not to plant a new variety of wheat), because one cannot exclude with absolute certainty that they conspired to charge the same price (or conspired not to adopt a new variety of wheat).

The "parallel behavior is enough" standard would enable plaintiffs to claim that sellers in the same alleged market engaged in a conspiracy in restraint of trade on the basis of the fact that they acted (or have not acted) in similar ways, such as increasing or decreasing prices around the same time, entering or not entering certain markets, introducing or not introducing similar competing products, and so forth. The sweeping nature of the standard is seen in the case at hand. According to the Second Circuit, the parallel failure of the defendants to enter each other's territories—their failure to take an action—along with an unsupported assertion that this parallel failure was the result of conspiracy was sufficient for the case to proceed to discovery. *See Twombly*, 425 F. 3d at 117-18.

This "parallel behavior is enough" standard would impose significant costs on the economy and, thus, on consumers. Plaintiffs could pursue class action cases against companies based on only garden-variety economic behavior such as raising prices in response to higher demand or reducing capacity in response to shrinking demand. Rather than incurring the cost of discovery and litigation, and facing the risks

---

[2] *See* Paul A. Samuelson & William D. Nordhaus, ECONOMICS 51-53, 152-57 (18th ed. 2005).

always attendant in litigation even for innocent defendants, companies will often settle these lawsuits. That will provide further incentives to file frivolous cases. The direct costs to businesses resulting from this cycle of litigation and settlement costs are likely to be substantial in the aggregate.

However, these visible costs could be just the tip of the iceberg. Expected litigation and settlement costs are one of the factors that businesses consider in making decisions. Businesses will face a so-called "tax" in making the same efficient decisions as their competitors. At the margin, this tax will deter businesses from responding efficiently to changes in costs, demand, or technology. Over time it will reduce economic wealth and economic productivity.

The "plus factor" standard provides wide latitude for plaintiffs to pursue claims that businesses have conspired to restrain trade while limiting the disincentive that businesses would face under the "parallel behavior is enough" standard for taking the same competitive actions as their rivals. Under the "plus factor" standard, the courts inquire whether the facts pled tend to support an inference of conspiracy. (We take no view on exactly how strong this support should be.) This standard would require plaintiffs to allege behavior that tends to exclude the possibility of normal competitive behavior. For example, in the current case, courts would examine whether the failure to enter each other's markets tends to exclude the possibility of normal competitive behavior. The district court concluded it was not.

The Second Circuit concluded that the district court should not even have addressed this question. However, it recognized that its "parallel behavior is enough" standard could impose "colossal" costs that would induce defendants to settle "meritless claims":

> We are mindful that a balance is being struck here, that on one side of that balance is the sometimes colossal expense of undergoing discovery, that such costs them-

> selves likely lead defendants to pay plaintiffs to settle what would ultimately be shown to be meritless claims, that the success of such meritless claims encourages others to be brought, and that the overall result may well be a burden on the courts and a deleterious effect on the manner in which and efficiency with which business is conducted. If that balance is to be re-calibrated, however, it is Congress or the Supreme Court that must do so.

Twombly, 425 F. 3d at 117.

We urge the Supreme Court to recalibrate the balance selected by the Second Circuit and avoid the "colossal" costs on the economy recognized by that court.

ARGUMENT

I. PARALLEL BEHAVIOR AMONG NON-CONSPIRING FIRMS IN THE SAME INDUSTRY IS NORMAL AND COMMON

Firms that operate in the same market commonly make similar business decisions—including not considering or pursuing the myriad possibilities open to any business—for several reasons well known to economists.

To begin with, consider the textbook example of a market for a homogeneous commodity in which many small firms face the same demand and cost conditions.[3] In such a perfectly competitive market, all firms charge the same price at all times, so that all change price in parallel. Price in this idealized situation is determined not by collusion, but by the forces of supply and demand as they affect competitors acting independently. A change in demand (perhaps because of a

---

[3] *See* Samuelson & Nordhaus, *supra* note 2, at 147-48; Dennis W. Carlton & Jeffrey M. Perloff, MODERN INDUSTRIAL ORGANIZATION 56-58 (4th ed. 2005); N. Gregory Mankiw, PRINCIPLES OF MICROECONOMICS 290 (3d ed. 2004).

rise in gross domestic product (GDP)) or a change in supply (perhaps because of a fall in the cost of an input) will change the market price. All firms in the market, therefore, would change their price accordingly. Thus, in perfect competition without collusion, economists expect that all competing firms will act in parallel with each other. (These sorts of changes may also lead some firms to enter or exit the business.)

Of course, few, if any, real-world markets are perfectly competitive. However, the process just described applies broadly. Competing firms may end up charging different prices because they differentiate their products or they have some market power over some group of customers. However, because they face similar demand and cost conditions, an industry-wide change in demand or cost that leads one firm to change its prices will ordinarily lead its rivals to change their prices in the same direction for the same reason.

The proposition that firms in the same market commonly act in parallel in the absence of any sort of conspiracy is not restricted to prices. Competing firms make product design, entry, location, marketing, and other business decisions based on similar market conditions and information. Not surprisingly, because they are all seeking to maximize profit subject to similar constraints, they tend to make similar decisions.

Economists have identified several other factors that lead to firms in the same market engaging in parallel behavior.[4] Suppose firm A sees firm B do something that affects its market position (e.g., change the package size it sells). Firm A may follow firm B for three reasons. First, it may believe

---

[4] *See* Marvin Lieberman & Shigeru Asaba, *Why do Firms Imitate Each Other*, 31 ACADEMY MGMT REV. 2: 366-85 (2006); S. Bikhchandani, D. Hirshleifer & I. Welch, *Learning from the Behavior of Others: Conformity, Fads, and Informational Cascades*, 12 J. ECON. PERSP. 3:151-70 (1998); D. Scharfstein & J.C. Stein, *Herd Behavior and Investment*, 80 AMER. ECON. REV. 3: 465-79 (1990).

that firm B has superior information. In fact, much innovation gets diffused through industries precisely because of this imitative behavior.[5] Second, firm B's action may give it a competitive advantage; firm A can limit that competitive advantage by copying firm B. Third, it is possible that firm A and firm B, without conspiring, have decided to follow each other's changes in this arena. This sort of "conscious parallelism" is not a conspiracy and it is our understanding that it is not illegal. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984); *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954).

Of course, firms may also engage in parallel behavior as a result of a conspiracy. But, because there are other, more common sources of parallel behavior, merely observing parallel behavior does not, as a matter of logic, tend to exclude the possibility of independent action.

II. THE "PARALLEL BEHAVIOR IS ENOUGH" STANDARD WOULD PERMIT CLAIMS OF CONSPIRACY TO RESTRAIN TRADE AGAINST ALMOST ALL FIRMS

The "parallel behavior is enough" standard would allow conspiracy claims against firms that have engaged in routine competition to survive a motion to dismiss. As we understand it, a plaintiff could sue two or more firms for conspiring to restrain trade in violation of Section 1 of the Sherman Act by

---

[5] Jan Rivkin, *Imitation of Complex Strategies*, 46 MGMT SCI. 6: 824-44 (2000); Boyan Jovanovic & Glenn MacDonald, *Competitive Diffusion*, 102 J. POL. ECON. 1: 24-52 (1994); Paul Segerstrom, *Innovation, Imitation and Economic Growth*, 99 J. POL. ECON. 4: 807-27 (1991); R. Nelson & S. G. Winter, AN EVOLUTIONARY THEORY OF ECONOMIC CHANGE 265, 267-68 (Belknap Press, 1982).

(a) alleging that these firms made similar competitive business decisions (including not taking specific actions such as entering particular markets) that would be illegal if they were the result of a conspiracy, and (b) asserting, without offering any facts to support it, that this parallel behavior is in fact the result of a conspiracy.

Because under this standard plaintiffs need not have any evidence that the behavior was the result of a conspiracy and may simply claim this, the only part of the standard that could limit the universe of potential defendants is whether it is possible to plead facts (that must be taken as true) that support (a) above. Virtually all firms in the economy will be at risk under this standard. Incumbents will have changed price in parallel in response to demand and cost changes. Firms may have all lowered price when significant entry occurred. They will have relied on the same information and analysis of the same business conditions, to enter markets, chose business locations, design products, invest in innovation, and make other decisions that affect market outcomes—including not availing themselves of a myriad of possible business opportunities and therefore taking no action at all. Many firms will also have imitated rivals for a variety of reasons.

As we understand the Second Circuit's standard for dismissing a claim of conspiracy in restraint of trade, it would be possible for plaintiffs to assert a claim that would survive dismissal against virtually any set of two or more competing firms in the economy. (We have used the qualification "virtually" only because we cannot logically exclude the possibility of an exception.) Because a showing of market power is not a requirement for a Sherman Act Section 1 claim, the more than 24 million businesses[6] in the United States

[6] According to the U.S. Census Bureau the total number of U.S. businesses was 24,416,241 in 2003, *available at* http://www.census.gov/csd/susb/susb03.htm.

could, in principle, be subject to claims that could not be dismissed under the "parallel behavior is enough" standard.

III. THE "PARALLEL BEHAVIOR IS ENOUGH" STANDARD POSES A SIGNIFICANT ISSUE OF JUDICIAL AND PUBLIC POLICY

Economists have long recognized that conspiracies to restrain trade can cause significant economic losses through higher prices and reduced output.[7] Although agreements among competitors may promote economic efficiency, conspiracies, in which the members have suppressed the existence of an agreement among themselves, seldom, if ever, serve any competitive and efficiency-enhancing purpose. Conspiracies can also impose significant costs on society and are, by design, secret and hard to detect. Hence, there are sound economic reasons to impose substantial penalties to discourage firms from conspiring to restrain trade. The undersigned believe that antitrust law—and the courts—should be tough on cartels.

Economists have also recognized, however, that the legal system can impose significant costs on businesses, reduce economic efficiency, and ultimately harm consumers through higher prices and poorer products.[8] Unfortunately, some lawyers—or the plaintiffs they represent—abuse the legal system by filing cases that ultimately lack merit but impose significant costs and risks on business defendants.[9] Research

---

[7] *See* Adam Smith, THE WEALTH OF NATIONS 148 (Modern Library, 1994) ("People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.").

[8] *See* W. Kip Viscusi, Joseph E. Harrington, Jr. & John M. Vernon, ECONOMICS OF REGULATION & ANTITRUST 39-40 (4th ed. 2005).

[9] For a discussion of the use of antitrust litigation as a means of achieving anticompetitive results, *see* William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J. L. & ECON. 247 (1985).

indicates that private antitrust enforcement efforts already involve many claims that appear to be without merit.[10] This underscores the problem noted by the Second Circuit. *See Twombly*, 425 F.3d at 114-17. Some plaintiffs' lawyers use litigation to extract money from businesses that find it is cheaper and less risky to settle than to litigate.[11] Class certification litigation is sometimes used to extort companies into writing large checks that often inure to the benefit of the lawyers.

In determining the appropriate standard for dismissal of a claim of conspiracy to restrain trade, society faces a tradeoff, as do the courts. On the one hand, making it easier for plaintiffs to pursue claims and obtain discovery will increase the likelihood that plaintiffs will uncover conspiracies in restraint of trade. An easier standard will, more importantly, discourage conspiracies in the first place because they are more likely to be detected and punished. On the other hand, making it easier for plaintiffs to file claims and pursue discovery will encourage plaintiffs to bring cases that lack merit in the hope of a settlement or verdict and, in the process, consume judicial and business resources. Moreover, firms would face a disincentive to engage in parallel behavior

---

[10] *See* E. Snyder & T. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV. 551, 551-603 (1991); T. Kauper & E. Snyder, *An Inquiry into the Efficiency of Private Antitrust Enforcement*, 74 GEO. L. REV. 1163 (1986); Baumol & Ordover, *supra* note 9, at 252-53 (footnote omitted) ("[T]here is evidence that in antitrust suits private plaintiffs have a relatively low probability of winning their cases.") (citing Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J. L. & ECON. 365 (1970), and National Economic Research Associates, *Statistical Analysis of Private Antitrust Enforcement, Final Report* (1979)).

[11] *See, e.g., Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (noting that "class certification creates an insurmountable pressure on defendants to settle, whereas individual trials would not"); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299-1300 (7th Cir. 1995) (discussing the implications of the plaintiffs' claims lacking legal merit).

with their rivals because that behavior will make it more likely that they will be embroiled in litigation. Therefore, they will engage in less parallel behavior even when this behavior is efficient.

IV. THE "PARALLEL BEHAVIOR IS ENOUGH" STANDARD WOULD RESULT IN GREATER EXPENDITURE OF JUDICIAL AND BUSINESS RESOURCES

The "parallel behavior is enough" standard would encourage plaintiffs to file and pursue claims that companies have engaged in restraints of trade in violation of Section 1 of the Sherman Act. This likely would include plaintiffs adding gratuitous conspiracy charges to complaints in unrelated matters (breach of contract cases for example) to increase the costs of the litigation to defendants and put additional pressure on the defendants to settle. The direct cost of this standard and the behavior it would encourage includes costs to the judiciary as well as to businesses.

Additional judicial resources would be spent handling cases with conspiracy claims that meet the "parallel behavior is enough" standard. These include expenditures for personnel and other judicial resources. They also include the opportunity cost of the federal judiciary's time. Assuming the federal courts (and their facilities and staff) cannot expand to meet the additional litigation that would result under the "parallel behavior is enough" standard, the federal court dockets would become more congested. Other matters would receive less attention from the courts. The litigants in these other matters, and ultimately society, would suffer from the diversion of judicial resources to unmeritorious conspiracy claims. Businesses would also spend resources defending unfounded conspiracy claims. These costs would include direct litigation expenses such as hiring lawyers and handling document production. More importantly, they would include

the opportunity cost of management and staff time spent on litigation rather than on business matters.[12]

V. THE "PARALLEL BEHAVIOR IS ENOUGH" STANDARD WOULD RESULT IN REDUCED ECONOMIC EFFICIENCY AS FIRMS LIMIT EFFICIENT PARALLEL BEHAVIOR

Under the "parallel behavior is enough" standard, plaintiffs could claim conspiracy in restraint of trade against a firm by pleading facts that the firm acted in a way similar to its rivals and simply alleging that it did so as part of a conspiracy. The inclusiveness of the standard is best seen in the case at hand. Each of the incumbent local exchange carriers (ILECs) was accused of conspiring with the other local exchange carriers not because of any parallel action they took but because of parallel inaction they took. Each was alleged to have failed to avail itself of a provision of the Telecommunications Act of 1996 that could enable each ILEC to enter the other ILECs' territories and obtain interconnection privileges. Under the Second Circuit's view at least, the "parallel behavior is enough" standard would include actions in which two or more firms took similar actions or, alternatively, both decided not to take an action. In the case at hand, one can easily imagine the plaintiffs claiming conspiracy in restraint of trade if all of the ILECs had in fact entered each other's territories; then the claim could have been that the ILECs did that to preempt competition from the competing local exchange carriers (CLECs).

Any of the following similar actions by two or more firms could be considered parallel behavior:

---

[12] The processing time of complex antitrust requests was 484 days in 2005. *See* U.S. Department of Justice, "Chapter VII. Compliance with Time Limits/Status of Pending Requests" *in Freedom of Information Act (FOIA) Report for Fiscal Year 2005, available at* http://www.usdoj.gov/oip/annual_report/2005/05foiapg7.htm.

- entering a geographic area
- not entering a geographic area
- charging similar prices
- raising prices
- not raising prices
- lowering prices (in response to entry, say)
- introducing a new product line
- not introducing a new product line
- filing for a patent
- not filing for a patent
- adopting a particular new technology
- failing to adopt a particular new technology

The list is limited only by the ingenuity of the plaintiffs and their lawyers.

Economists have long recognized that competition among firms tends to lead to economic efficiency as firms seek advantages over one another.[13] Competing firms try to reduce their costs and seek unmet demand. Each, however, is responding to demand, costs, technological opportunities, information, public policies, and risk in the marketplace. In independently striving to lower costs and expand sales, rivals often mimic each other, just as prominent athletic teams do, as they compete in the marketplace. When one firm takes an action before its competitors do, the competitors typically examine that action to understand whether this leader secured a competitive advantage that they should also seek to share. This leads firms to imitate one another, though innovative firms often secure short-run benefits before their rivals catch on. This dynamic process of competition, which is the source of much of the growth in productivity and product improvement, is built, in great part, on behavior that at least appears parallel.

Economists and the courts are aware that firms also may follow each other in order to reduce rivalry. For example, a

---

[13] *See* Samuelson & Nordhaus, *supra* note 2, at 158-59, 216, 283; Carlton & Perloff, *supra* note 3, at 69-71.

firm may choose not to reduce price because it knows its rivals will reciprocate with lower prices as well. The courts have recognized, however, that it is difficult to distinguish competitive behavior from conscious parallelism. Therefore, they have decided that the costs of discouraging conscious parallelism outweigh the benefits of discouraging competitive parallel behavior that promotes efficiency. As noted above, it has long been established that conscious parallelism, even if it results in parallel behavior, does not violate Section 1 of the Sherman Act or any other rule of U.S. antitrust law.[14]

A similar tradeoff is at the heart of the policy issue that is posed by the alternative standards for dismissing a claim of conspiracy in restraint of trade. Allowing plaintiffs to pursue claims of conspiracy that meet the "parallel behavior is enough" standard may unearth some conspiracies that would not be detected under the "plus factor" standard (just as any discovery "fishing expedition" may by chance uncover evidence that could lead to a valid claim). The "parallel behavior is enough" standard, however, will impose a tax on the dynamic process of competition that will tend to discourage firms from engaging in efficient behavior. From the standpoint of economics, the policy issue presented by the alternative dismissal standards for a conspiracy in restraint of trade is whether the additional conspiracies uncovered and deterred by the less exacting standard is worth the resulting loss in dynamic competition and efficiency.

The undersigned have not conducted any studies of the loss in social welfare that would result from the "parallel behavior is enough" tax and it may be difficult, if not impossible, to quantify the loss. However, we believe the Court should be

---

[14] *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984); *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954).

cognizant of potential costs resulting from this tax in assessing the tradeoff we have discussed above.

Parallel behavior can involve a wide variety of business actions and inactions, as we mentioned above. For each of those actions or inactions, businesses would face an additional direct and indirect cost of litigation—the tax—if those actions or inactions were similar to actions or inactions taken by one or more competitors. The tax is (roughly) equal to the additional probability of being sued times the cost of litigation if sued. For many small and medium-sized firms, the tax would probably be quite small, because the probability that any such firm would be sued on the basis of parallel conduct would be low. (The tax probably would not be zero, however, since plaintiffs could, at little cost, add a conspiracy charge to many garden-variety claims.) On the other hand, for the large firms that account for the bulk of gross domestic product, the tax could be significant. Such firms face a significant likelihood of being sued, and the cost of litigating an antitrust case in terms of lost management time is likely to be significant.

This tax will tend to discourage firms from taking the sorts of efficient actions that make up dynamic competition. Firms compare the costs and benefits of taking actions. The tax makes the costs of certain kinds of actions higher. Imposing it, therefore, will lead firms not to take certain efficiency-enhancing actions. The tax will, in particular, tend to discourage firms from engaging in the imitative behavior that underlies the diffusion of information and technology in the marketplace. In addition, because the "parallel behavior is enough" standard can be applied to the parallel failure to take actions, firms will be encouraged to take some actions that they might not have otherwise taken.

The overall effect of the tax on the economy is based on summing the effect of the tax on discouraging efficient business behavior across all firms in all markets that would be

affected by the "parallel behavior is enough" standard. We would expect that most large firms that do business nationally would be subject to the tax if the Second Circuit decision stands, because plaintiffs would seek to file cases with claims of conspiracy in restraint of trade in that circuit. The efficiency losses resulting from adopting the "parallel behavior is enough" standard would also need to be summed over time for as long as this standard remained law in the Second Circuit or other circuits.

Thus, the costs of the "parallel behavior is enough" standard would very likely be substantial even if it remains the law only in the Second Circuit.

VI. THE "PLUS FACTOR" STANDARD STRIKES A REASONABLE BALANCE BETWEEN DETECTING AND DETERRING CONSPIRACIES AND LIMITING THE INCENTIVES OF FIRMS TO ENGAGE IN NORMAL PRO-COMPETITIVE BEHAVIOR

The "plus factor" standard would seem to us, as economists, to impose a low hurdle for plaintiffs that wish to pursue a claim of conspiracy in restraint of trade in violation of Section 1 of the Sherman Act. Plaintiffs need only allege facts that would tend to exclude the possibility of independent action to survive a motion to dismiss a claim of conspiracy. The plaintiffs would not have the burden of proffering evidence of an actual conspiracy, and neither the court nor the defendant could question the facts. Plaintiffs would, however, be required to explain why the alleged behavior is likely to result from collusion. Under the "plus factor" standard, the court is only permitted to assess whether that logical explanation tends to exclude the possibility that the alleged conspirators acted independently.[15] As a matter of first

[15] *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

impression the "plus factor" standard would seem to us to strike a sensible balance because it requires plaintiffs to have facts that tend to suggest a conspiracy or some reason for the court to believe that the allegation of conspiracy is not simply a device to get to discovery. We therefore endorse the "plus factor" approach as the more reasonable insofar as it recognizes that one must have more than "parallel behavior" for a credible claim of conspiracy in restraint of trade under Section 1 of the Sherman Act.

CONCLUSION

The "parallel behavior is enough" standard cannot assist the courts in distinguishing horizontal agreements to restrain trade from normal competition. It would very likely impose significant costs on the economy by distorting competitive incentives and encouraging meritless litigation designed mainly to induce financial settlements.

Respectfully submitted,

R. HEWITT PATE
Counsel of Record
PAUL S. HAYES
HUNTON & WILLIAMS LLP
1900 K Street, N.W.
Washington D.C. 20006
(202) 955-1500

Counsel for Amici Curiae

APPENDIX

APPENDIX

LIST OF *AMICI*

William J. Baumol
Harold Price Professor of Entrepreneurship and Academic Director of the Berkeley Center for Entrepreneurial Studies
Stern School of Business, New York University

Michael J. Boskin[1]
Senior Fellow, Hoover Institution
T.M. Friedman Professor of Economics
Stanford University
Former Chairman, President's Council of Economic Advisers, 1989-1993

Robert W. Crandall
Senior Fellow, Economic Studies
Brookings Institution

Kenneth G. Elzinga
Robert C. Taylor Professor of Economics
University of Virginia

David S. Evans
Executive Director, Jevons Institute for Competition Law and Economics and Visiting Professor
University College London

Gerald R. Faulhaber
Business and Public Policy Department
Professor of Business and Public Policy, Management, and Law
Wharton School, University of Pennsylvania
Former Chief Economist, Federal Communications Commission, 2000-2001

---

[1] Dr. Boskin is an expert on macroeconomics and public finance but has extensive experience in antitrust policy.

Franklin M. Fisher
Jane Berkowitz Carlton and Dennis William Carlton
Professor of Economics, Emeritus
Massachusetts Institute of Technology
John Bates Clark Award for top economist under the
age of 40, 1973

Luke M. Froeb
William C. and Margaret W. Oehmig Associate Professor in
Entrepreneurship and Free Enterprise
Owen Graduate School of Management, Vanderbilt
University
Former Director, Bureau of Economics, Federal Trade
Commission, 2003-2005

Richard J. Gilbert
Professor of Economics
University of California, Berkeley
Former Deputy Assistant Attorney General for Economics,
U.S. Department of Justice, Antitrust Division, 1993-1995

Paul L. Joskow
Elizabeth and James Killian Professor of Economics and
Management
Department of Economics and Sloan School of Management
Massachusetts Institute of Technology

Michael L. Katz
Sarin Chair in Strategy and Leadership
Haas School of Business and Department of Economics
University of California, Berkeley
Former Deputy Assistant Attorney General for Economic
Analysis, U.S. Department of Justice, Antitrust Division,
2001-2003

Paul Milgrom
Leonard and Shirley Ely Jr. Professor of Economics
Stanford University

Thomas Gale Moore
Senior Fellow, Hoover Institution
Stanford University
Former Member, President's Council of Economic Advisers, 1985-1989

Janusz A. Ordover
Professor of Economics and Director, Masters of Economics Program
New York University
Former Deputy Assistant Attorney General for Economics, U.S. Department of Justice, Antitrust Division, 1991-1992

Robert S. Pindyck
Bank of Tokyo-Mitsubishi Professor of Economics and Finance
Sloan School of Management
Massachusetts Institute of Technology

Robert H. Porter
William R. Kenan, Jr. Professor of Economics
Northwestern University, Evanston, IL

Frederic M. Scherer
Aetna Professor Emeritus
John F. Kennedy School, Harvard University
Former Director, Bureau of Economics, Federal Trade Commission, 1974-1976

Richard Schmalensee
John C Head III Dean and Professor of Management and Economics
Sloan School of Management
Massachusetts Institute of Technology
Former Member, President's Council of Economic Advisers, 1989-1991

Marius Schwartz
Professor of Economics
Georgetown University, Department of Economics
Former Acting Deputy Assistant Attorney General for Economics, U.S. Department of Justice, Antitrust Division, 1999

David S. Sibley
John Michael Stuart Centennial Professor of Economics
University of Texas at Austin
Former Deputy Assistant Attorney General for Economic Analysis, U.S. Department of Justice, Antitrust Division, 2003-2004

Vernon L. Smith
Professor of Economics and Law
George Mason University
Nobel Prize winner in Economics, 2002

Edward A. Snyder
George Pratt Shultz Professor of Economics
Graduate School of Business, University of Chicago

A. Michael Spence
Senior Fellow, Hoover Institution
Philip H. Knight Professor Emeritus of Management
Graduate School of Business, Stanford University
Nobel Prize winner in Economics, 2001

Pablo T. Spiller
Jeffrey A. Jacobs Distinguished Professor of Business & Technology
University of California, Berkeley

Alan O. Sykes
The Herman Phleger Visiting Professor of Law
Stanford Law School

David J. Teece
Mitsubishi Bank Professor of International Business
and Finance
University of California, Berkeley

Michael D. Whinston
Robert E. and Emily King Professor of Business Institutions
Northwestern University, Evanston, IL

786A (21)

No. 05-1126

FILED

OCT 13 2006

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

BELL ATLANTIC CORPORATION, *et al.*,
Petitioners,

v.

WILLIAM TWOMBLY, *et al.*, Individually and on Behalf of all others similarly situated,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* LEGAL SCHOLARS DEBRA LYN BASSETT, JOSEPH P. BAUER, JOHN S. BECKERMAN, KEVIN M. CLERMONT, WILLIAM V. DORSANEO III, CHRISTOPHER M. FAIRMAN, JACKIE GARDINA, SUSAN HARTHILL, ALLAN IDES, DANNE L. JOHNSON, DAVID LEVINE, TYLER T. OCHOA, STEPHEN A. SALTZBURG, GREGORY C. SISK, JOAN E. STEINMAN, JEFFREY W. STEMPEL, BETH STEPHENS AND ELIZABETH G. THORNBURG, AND OF CERTAIN PURCHASERS OF ELEVATORS AND ELEVATOR MAINTENANCE SERVICES, INCLUDING TRANSHORN LTD., *ET AL.* IN SUPPORT OF RESPONDENTS

MARY JANE FAIT *
WOLF HALDENSTEIN ADLER FREEMAN & HERZ, LLP
55 West Monroe Street, Suite 1111
Chicago, IL 60603
(312) 984-0000

* Counsel of Record

ERIC ALAN ISAACSON *
MARK SOLOMON
CHRISTOPHER M. BURKE
TAMI FALKENSTEIN HENNICK
LERACH COUGHLIN STOIA GELLER RUDMAN & ROBBINS LLP
655 West Broadway, Suite 1900
San Diego, CA 92101
(619) 231-1058

Counsel for Amici Curiae Legal Scholars Debra Lyn Bassett, Joseph P. Bauer, John S. Beckerman, Kevin M. Clermont, William V. Dorsaneo III, Christopher M. Fairman, Jackie Gardina, Susan Harthill, Allan Ides, Danne L. Johnson, David Levine, Tyler T. Ochoa, Stephen A. Saltzburg, Gregory C. Sisk, Joan E. Steinman, Jeffrey W. Stempel, Beth Stephens and Elizabeth G. Thornburg, and for Certain Purchasers of Elevators and Elevator Maintenance Services, Including Transhorn Ltd., et al.

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

PETITIONERS' QUESTION PRESENTED

Whether a complaint states a claim under Section 1 of the Sherman Act, 15 U.S.C. §1, if it alleges that the defendants engaged in parallel conduct and adds a bald assertion that the defendants were participants in a "conspiracy," without any allegations that, if later proved true, would establish the existence of a conspiracy under the applicable legal standard.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI CURIAE*	1
ARGUMENT	4
I. NOTICE-PLEADING PRINCIPLES RELIEVE PLAINTIFFS OF PLEADING FACTS TO DEMONSTRATE THEIR CLAIMS	4
A. This Court Holds That Plaintiffs Are Not Required To Plead Facts Establishing Their Claims	9
B. Notice-Pleading Presumptions Apply With Particular Force To Antitrust Cases	13
C. Notice Pleading Revisited: When Lower Courts Ignore This Court's Precedents	16
D. *Dura Pharmaceuticals* Works No Revolution In Pleading Standards	21
II. UNDER FEDERAL RULE OF CIVIL PROCEDURE 9(b), CONSPIRATORIAL STATE OF MIND MAY BE AVERRED GENERALLY WITHOUT SETTING FORTH ANY FACTS FROM WHICH IT MIGHT BE INFERRED	21
CONCLUSION	26

TABLE OF AUTHORITIES

CASES	Page
Andrx Pharms., Inc. v. Elan Corp., PLC, 421 F.3d 1227 (11th Cir. 2005)	20
Associated Gen. Contractors v. Cal. State Council of Carpenters, 459 U.S. 519 (1983)	15
Boston & Maine Corp. v. Town of Hampton, 987 F.2d 855 (1st Cir. 1993)	16
Branch v. Tunnell, 14 F.3d 449 (9th Cir. 1994)	19
Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6, 493 U.S. 67 (1989)	10
Brownlee v. Conine, 957 F.2d 353 (7th Cir. 1992)	8
Broxmeyer v. Polikoff, 39 Pa. D. & C. 224 (C.P. Phila. County 1940)	23
C.E. Stevens Co. v. Foster & Kleiser Co., 311 U.S. 255 (1940)	13
Cash Energy, Inc. v. Weiner, 768 F. Supp. 892 (D. Mass. 1991)	16
Celotex Corp. v. Catrett, 477 U.S. 317 (1986)	15
Commerzanstalt v. Telewide Sys., 880 F.2d 642 (2d Cir. 1989)	6
Conley v. Gibson, 355 U.S. 41 (1957)	*passim*
Daves v. Hawaiian Dredging Co., 114 F. Supp. 643 (D. Haw. 1953)	17
Dickson v. Microsoft Corp., 309 F.3d 193 (4th Cir. 2002)	20
Doe v. Hillsboro Indep. Sch. Dist., 81 F.3d 1395 (5th Cir. 1996)	16

TABLE OF AUTHORITIES—Continued

	Page
Dura Pharms., Inc. v. Broudo, 544 U.S. 336 (2005)	21
Elliott v. Perez, 751 F.2d 1472 (5th Cir. 1985)	16, 17
Estate Constr. Co. v. Miller & Smith Holding Co., 14 F.3d 213 (4th Cir. 1994)	20
Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979)	12
H. J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229 (1989)	10
Hammes v. AAMCO Transmissions, 33 F.3d 774 (7th Cir. 1994)	19
Harris v. Nelson, 394 U.S. 286 (1969)	5
Hishon v. King & Spalding, 467 U.S. 69 (1984)	10, 11, 13
Hodgson v. Virginia Baptist Hosp., 482 F.2d 821 (4th Cir. 1977)	7
Hoskins v. Poelstra, 320 F.3d 761 (7th Cir. 2003)	8
Hosp. Bldg. Co. v. Trs. of Rex Hosp., 425 U.S. 738 (1976)	14, 17
Hutchinson ex rel. Baker v. Spink, 126 F.3d 895 (7th Cir. 1997)	8
In re Enron Corp. Sec., Derivative & ERISA Litig., 439 F. Supp. 2d 692 (S.D. Tex. 2006)	21
In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541 (9th Cir. 1994)	24
In re Tower Air, Inc., 416 F.3d 229 (3d Cir. 2005)	8, 13
In re Urethane Antitrust Litig., 409 F. Supp. 2d 1275 (D. Kan. 2005)	20

TABLE OF AUTHORITIES—Continued

Page

Ingalls v. Raklios,
21 N.E. 2d 856 (Ill. Ct. App. 1939),
rev'd, 26 N.E. 2d 468 (Ill. Sup. Ct. 1940) 23
Karim-Panahi v. Los Angeles Police Dept.,
839 F.2d 621 (9th Cir. 1988) 18
Kimberlin v. Quinlan,
6 F.3d 789 (D.C. Cir. 1993) 19
Kolupa v. Roselle Park Dist.,
438 F.3d 713 (7th Cir. 2006) 8
Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,
954 F.2d 1054 (5th Cir. 1992) 17
Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,
507 U.S. 163 (1993) ..... *passim*
Love v. Commercial Cas. Ins. Co.,
26 F. Supp. 481 (S.D. Miss. 1939) 23
Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 11, 12, 13
Lujan v. Nat'l Wildlife Fed'n,
497 U.S. 871 (1990) 11, 12
Lum v. Bank of Am.,
361 F.3d 217 (3d Cir. 2004) 20
MCM Partners v. Andrews-Bartlett & Assocs.,
62 F.3d 967 (7th Cir. 1995) 19, 20
McLain v. Real Estate Bd.,
444 U.S. 232 (1980) 14
NOW v. Scheidler,
510 U.S. 249 (1994) 10, 11, 13
Neitzke v. Williams,
490 U.S. 319 (1989) 10
O'Brien v. Nat'l Prop. Analysts Partners,
936 F.2d 674 (2d Cir. 1991) 24

TABLE OF AUTHORITIES—Continued

Page

Palmer v. Board of Education,
46 F.3d 682 (7th Cir. 1995) 7, 8, 27
Poindexter v. Nat'l Mortgage Co.,
No. 94 C 5814, 1995 U.S. Dist. LEXIS 5396
(N.D. Ill. Apr. 18, 1995) 19
Poller v. CBS,
368 U.S. 464 (1962) 14
Ross v. A. H. Robins Co.,
607 F.2d 545 (2d Cir. 1979) 24
Sanjuan v Am. Bd. of Psychiatry & Neurology, Inc.,
40 F.3d 247 (7th Cir 1994) 7, 11
Sargeaunt v. Cardiff Junction Dry Dock Co.,
W.N. 263 (1926) 23
Scheuer v. Rhodes,
416 U.S. 232 (1974) 10, 11, 16
Shah v. County of Los Angeles,
797 F.2d 743 (9th Cir. 1986) 18
Sparks v. England,
113 F.2d 579 (8th Cir. 1940) 9
Sutliff, Inc. v. Donovan Cos.,
727 F.2d 648 (7th Cir. 1984) 16, 17, 19, 20
Swierkiewicz v. Sorema N.A.,
534 U.S. 506 (2002) ..... *passim*
Syncsort v. Sequential Software, Inc.,
50 F. Supp. 2d 318 (D.N.J. 1999) ..... *passim*
Thomson v. Washington,
362 F.3d 969 (7th Cir. 2004) 7
United States v. LSL Biotechnologies,
379 F.3d 672 (9th Cir. 2004) 20
Whalen v. Ford Motor Credit Co.,
684 F.2d 272 (4th Cir. 1982) 6

TABLE OF AUTHORITIES—Continued

Page

Zahn v. Int'l Paper Co.,
414 U.S. 291 (1973) 6

STATUTES, RULES AND REGULATIONS

15 U.S.C.

§77z-1 25
§77z-2 25
§78u-4(b) 25
§78u-5 25

18 U.S.C.

§1962 12
§1964(c) 12

42 U.S.C.

§1983 17

Federal Rules of Civil Procedure

Rule 1 2
Rule 8 ..... 4, 20, 22
Rule 8(a) 5, 7, 20
Rule 9(b) ..... *passim*
Rule 12(b)(6) 26
Rule 12(e) 26
Rule 56 11
Rule 56(e) 12

Rules of the Supreme Court of the United States

Rule 37.3 (a) 4

SECONDARY AUTHORITIES

John Avery, *Securities Litigation Reform: The Long and Winding Road to the Private Securities Litigation Reform Act of 1995*,
51 Bus. Law. 335 (1996) 25

TABLE OF AUTHORITIES—Continued

Page

Paul D. Carrington, *Virtual Civil Litigation: A Visit to John Bunyan's Celestial City*, 98 Colum., L. Rev. 1516 (1998) 6

Charles E. Clark, *Simplified Pleading*, 2 FRD 456 (1943) 5, 6, 7, 8

Charles E. Clark, *Handbook of the Law of Code Pleading*, §380020 (2d ed. 1947) ..... *passim*

Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976, 977 (1937) 6

Charles E. Clark, *The Proposed Federal Rules of Civil Procedure*, 22 A.B.A. J. 447 (1936) 6

Charles E. Clark, *The Handmaid of Justice*, 23 Wash. U.L.Q. 297 (1938) 6

The Complaint Under the Federal Rules of Civil Procedure, 10 Fordham L. Rev. 252 (1941) 9

Palmer D. Edmunds, *The New Federal Rules of Civil Procedure*, 4 John Marshall L.Q. 291 (1938) 7

Christopher M. Fairman, *An Invitation to the Rulemakers –Strike Rule 9(b)*, 38 U.C. Davis L. Rev. 281 (2004) 22

Christopher M. Fairman, *Heightened Pleading*, 81 Tex. L. Rev. 551 (2002) 7, 16, 19

Christopher M. Fairman, *The Myth of Notice Pleading*, 45 Ariz. L. Rev. 987 (2003) 15, 16, 19, 20

TABLE OF AUTHORITIES—Continued

Page

William S. Lerach & Eric Alan Isaacson, *Pleading Scienter Under Section 21D(b)(2) of the Securities Exchange Act of 1934: Motive, Opportunity, Recklessness, and the Private Securities Litigation Reform Act of 1995*, 33 San Diego L. Rev. 893 (1996) 24, 25

Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 Tex. L. Rev. 1749 (1998) 19, 24

Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 Colum. L. Rev. 433 (1986) 6, 24

Minutes of the Advisory Committee on Federal Rules of Civil Procedure, 1993 WL 761148 (Oct. 21, 1993) 18

Rules of Civil Procedure, Am. Jud. Soc. Bull. 14 ..... 22, 23

Hillary Sale, *Heightened Pleading and Discovery Stays: An Analysis of the Affect of the PSLRA's Internal Information Standard on '33 and 34 Act Claims*, 76 Wash. L. Q. 537 (1998) 25-26

Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 Yale L. J. 914 (1976) 6

5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure: Civil 3d* §1202 91 (3d ed. 2004) 5, 20

IN THE

Supreme Court of the United States

BELL ATLANTIC CORPORATION, *et al.*,
Petitioners,

v.

WILLIAM TWOMBLY, *et al.*, Individually and on Behalf of all others similarly situated,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* LEGAL SCHOLARS DEBRA LYN BASSETT, JOSEPH P. BAUER, JOHN S. BECKERMAN, KEVIN M. CLERMONT, WILLIAM V. DORSANEO III, CHRISTOPHER M. FAIRMAN, JACKIE GARDINA, SUSAN HARTHILL, ALLAN IDES, DANNE L. JOHNSON, DAVID LEVINE, TYLER T. OCHOA, STEPHEN A. SALTZBURG, GREGORY C. SISK, JOAN E. STEINMAN, JEFFREY W. STEMPEL, BETH STEPHENS AND ELIZABETH G. THORNBURG, AND FOR CERTAIN PURCHASERS OF ELEVATORS AND ELEVATOR MAINTENANCE SERVICES, INCLUDING TRANSHORN LTD., ET AL. IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI CURIAE* [1]

Amici filing this brief comprise two distinct groups: (1) legal scholars and law professors with an academic interest in

[1] No counsel for any party before the Court in this proceeding has authored this brief or any portion of it. As noted in text, counsel of record represent several of the *amici* as plaintiffs-appellants in a case currently pending before the United States Court of Appeals for the Second Circuit. *See In re Elevator Antitrust Litig.*, No. 06-3128-cv (2d Cir.), *on appeal from In re Elevator Antitrust Litig.*, No. 04-cv-01178 (TPG) (S.D.N.Y.). They may ultimately seek compensation in that case for the work and expenses incurred in preparing this brief.

sound development of procedural law having no financial interest in the outcome of this case, and (2) purchasers of elevators and elevator maintenance services who are currently litigating antitrust claims in the Second Circuit.

The *amici* who are legal scholars teach, write about, or have an interest in Federal Civil Procedure. They care deeply about the fundamental principles underlying the pursuit of justice in the American legal system, and are committed to ensuring that procedural law continues to develop in accordance with those principles. They have a strong interest in assisting this Court to interpret the law in a way that is consistent with both the Federal Rules of Civil Procedure's text and their underlying purpose—"to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. They have no interest in the outcome of this litigation except as it pertains to these concerns.

The academic *amici* are:

Debra Lyn Bassett, Loula Fuller and Dan Myers Professor of Law, Florida State University College of Law;

Joseph P. Bauer, Professor of Law, Notre Dame Law School;

John S. Beckerman, Associate Dean for Academic Affairs, Rutgers School of Law-Camden;

Kevin M. Clermont, James and Mark Flanagan Professor of Law, Cornell Law School;

William V. Dorsaneo III, Chief Justice John and Lena Hickman Distinguished Faculty Fellow and Professor of Law, Southern Methodist University Dedman School of Law;

Christopher M. Fairman, Visiting Professor of Law, Emory University School of Law, Associate Professor of Law, The Ohio State University Moritz College of Law;

Jackie Gardina, Associate Professor of Law, Vermont Law School;

Susan Harthill, Assistant Professor of Law, Florida Coastal School of Law;

Allan Ides, Professor of Law and William M. Rains Fellow, Loyola Law School (Los Angeles);

Danne L. Johnson, Assistant Professor of Law, Oklahoma City University School of Law;

David Levine, Professor of Law, University of California Hastings College of the Law;

Tyler T. Ochoa, Professor of Law, Santa Clara University School of Law;

Stephen A. Saltzburg, Wallace and Beverly Woodbury University Professor of Law, The George Washington University Law School;

Gregory C. Sisk, Professor of Law, University of St. Thomas School of Law;

Joan E. Steinman, Distinguished Professor of Law, Chicago-Kent College of Law, Illinois Institute of Technology;

Jeffrey W. Stempel, Doris S. & Theodore B. Lee Professor of Law, University of Nevada, Las Vegas William S. Boyd School of Law;

Beth Stephens, Professor of Law, Rutgers School of Law-Camden; and

Elizabeth G. Thornburg, Professor of Law, Southern Methodist University Dedman School of Law.

Finally, the following *amici* are purchasers of elevators and elevator maintenance services, who are serving as representative plaintiffs in an antitrust action currently pending before the United States Court of Appeals as *In re Elevator Antitrust Litigation*, No. 06-3128-cv (2d Cir.), a case in which briefing is likely to be completed after the scheduled oral argument in this matter: Transhorn, Ltd.; 1775 Housing Associates; Triangle Housing Associates L.P.; Rochdale

Village, Inc.; Birmingham Building Trades Towers, Inc.; Riverbay Corp.; D.F. Chase, Inc.; Towers of Coral Springs Ltd.; 181 Maple Avenue Associates; Lenox Road Associates; Olen Commercial Realty Corp.; Bay Crest Condominium Ass'n; Joseph M. Bennardi d/b/a Nedmac Associates, Inc.; and Joseph M. Bennardi d/b/a Building Supers of Camden, Inc. These *amici* have an interest in the outcome of this case because it may constitute a controlling precedent for the pleading standards in their own antitrust case.

On August 18, 2006, the parties filed written consent with this Court to the filing of *amicus curiae* briefs, including this brief. *See* S. Ct. Rule 37.3(a).

ARGUMENT

I. NOTICE-PLEADING PRINCIPLES RELIEVE PLAINTIFFS OF PLEADING FACTS TO DEMONSTRATE THEIR CLAIMS

Petitioners' Brief presents the case as one that turns upon general pleading rules—which they contend require detailed fact pleading. Their Argument opens:

> This Court's decisions establish two fundamental pleading rules that bear decisively on this case. First, a complaint must allege facts, not merely conclusions, that show the plaintiff is entitled to relief under the governing substantive law. Second, it is the facts alleged, not alleged facts that the plaintiff might later prove, that must support the claim to relief.

Petitioners' Brief at 16. Petitioners' central contention is stated bluntly in their Argument's subheading I.A.: "Rule 8 Requires Pleading of Facts, Not Mere Conclusory Assertions, To Support a Plaintiff's Claim." *Id.*

Petitioners' argument runs counter to this Court's long-standing notice-pleading decisions, which all hold that plaintiffs need only provide the short statement required by

Federal Rule of Civil Procedure 8(a) to place defendants on notice of the nature of the claims against them—without providing the facts and evidence that might ultimately be used to prove those claims. Petitioners' argument also runs counter to the very purpose of the Federal Rules of Civil Procedure which were designed to replace both the technicalities of common law pleadings and the detail of "code" or "fact-pleading" with a new regime of simplified notice pleading. *See generally* Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 456-67 (1943); Charles E. Clark, *Handbook of the Law of Code Pleadings* §38, at 241-43 (2d ed., 1947).

"Under the codes the emphasis was placed on developing the facts through the pleadings."[2] The Federal Rules' framers rejected that approach for one that requires a pleading only to give "the opposing party fair notice of the nature and basis or grounds of the pleader's claim and a general indication of the type of litigation that is involved."[3]

> It was the design of the rulemakers that the discovery procedures should give the parties an opportunity for securing an elaboration of the allegations and that process and not the pleadings bears the burden of filling in the details of the dispute for the parties and the court. In federal practice, the test of a complaint's sufficiency simply is whether the document's allegations are detailed and informative enough to enable the defendant to respond.[4]

Judge Charles E. Clark, who as Dean of the Yale Law School "served as Reporter of the Advisory Committee on the Federal Rules,"[5] is widely recognized as the Rules' "principal

---

[2] 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure: Civil 3d* §1202, at 91 (3d ed. 2004).

[3] *Id.*, §1215, at 172-73.

[4] *Id.*, §1215, at 174-93.

[5] *Harris v. Nelson*, 394 U.S. 286, 290 n.1 (1969).

architect,"[6] and has even been called their "father."[7] He explained that the goal for pleadings is to "emphasize only the setting forth of the factual situation as a whole," and not "all the fine details" or evidentiary facts that may be needed to prove the claim.[8] The Rules' framers understood that even in the simplest negligence case, where percipient witnesses viewed an automobile accident,

> the testimony of even honest eyewitnesses may vary or conflict, and a slight difference in the timing of events, such as when a pedestrian stepped into the street in front

---

[6] *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 296-97 (1973) (Clark "a principal architect").

[7] *Commerzanstalt v. Telewide Sys.*, 880 F.2d 642, 646 (2d Cir. 1989) (quoting M. Schick, *Learned Hand's Court* 30-31 & n.81 (1970)); *see* Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 Colum. L. Rev. 433, 433 (1986) ("As Dean of Yale Law School and reporter of the committee that drafted the Federal Rules of Civil Procedure, Charles Clark was the principal architect of the Rules and leading proponent of the liberal ethos that underlies them."); Michael E. Smith, *Judge Charles E. Clark and The Federal Rules of Civil Procedure*, 85 Yale L. J. 914, 915 (1976) ("he was principally responsible for the drafting of the Federal Rules, which became law in 1938."); Paul D Carrington, *Virtual Civil Litigation: A Visit to John Bunyan's Celestial City*, 98 Colum. L. Rev. 1516, 1518 & n.10 (1998) (noting that the movement to reform the Federal Rules "was led by Charles Clark and his associates, who drafted the Federal Rules of Civil Procedure promulgated in 1938"); *Whalen v. Ford Motor Credit Co.*, 684 F.2d 272, 277 (4th Cir. 1982) ("Clark, as reporter [was] necessarily the member most familiar with the rules.").

[8] Clark, *Simplified Pleading*, 2 F.R.D. at 457; *see also* Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976, 977 (1937) ("Moreover, through the weapons of discovery and summary judgment we have developed new devices, with more appropriate penalties to aid in matters of *proof*, and do not need to force the pleadings to their less appropriate function."); Charles E. Clark, *The Proposed Federal Rules of Civil Procedure*, 22 A.B.A. J. 447, 449-50 (1936); Charles E. Clark, *The Handmaid of Justice*, 23 Wash. U.L.Q. 297, 316 (1938).

> of an approaching car, may be absolutely decisive. A lawyer, therefore, cannot safely or wisely restrict the case he offers to prove before he knows what the testimony will actually show.

Clark, *Simplified Pleading*, 2 F.R.D. at 457.

Even in the simplest of cases, a lawyer cannot, in fine, plead all the facts that ultimately will be needed to prove a case. *Id.* Much less can he do so when the case turns on a complex conspiracy, rather than a simple tort.[9] Summarizing the then-new "notice pleading" in 1938, Commissioner Palmer D. Edmunds wrote: "The idea is that you are not to be compelled to state a cause of action giving all of the elements which we now think necessary to a case. All that should be needed is an informal statement of what you are suing about." Palmer D. Edmunds, *The New Federal Rules of Civil Procedure*, 4 John Marshall L.Q. 291, 298 (1938).

Petitioners ask this Court to require much more—the pleading of facts to support a claim. But that is a requirement that the Federal Rules' framers deliberately eliminated to mark a clear departure from past pleading practice. In Rule 8(a), "the drafters of the Federal Rules substituted the word 'claim' for 'cause of action,' dropped the requirement that the complaint allege 'facts,' and expanded discovery procedures," to ensure that a claim may be simply stated with the critical facts to be developed in discovery. *Hodgson v. Virginia Baptist Hosp.*, 482 F.2d 821, 823 (4th Cir. 1977). "Any need to plead facts that, if true, establish each element of a 'cause of action' was abolished by the Rules of Civil Procedure in 1938." *Sanjuan v Am. Bd. of Psychiatry & Neurology, Inc.*, 40 F.3d 247, 251 (7th Cir. 1994) (Easterbrook, J.). Simply put: "The federal rules replaced fact pleading with notice pleading." *Thomson v. Washington*, 362 F.3d 969, 970 (7th Cir. 2004) (Posner, J.); *see also*

---

[9] *See, e.g., Palmer v. Bd. of Educ.*, 46 F.3d 682, 688 (7th Cir. 1995).

Christopher M. Fairman, *Heightened Pleading*, 81 Tex. L. R. 551, 556 (2002).

The Rules' chief architect explained: "By omitting any reference to 'facts' the Federal Rules have avoided one of the most controversial points in code pleading." Clark, *Handbook of the Law of Code Pleading* §38 at 242. "This departure from the traditional code-pleading requirement has been liberally applied by the courts and lauded by the legal writers," Judge Clark noted in 1947. *Id.* at 242-43. Sound decisions follow it still: "Complaints need not plead facts . . . . It is enough if the complaint puts the defendants on notice of the claim and that some set of facts could be presented that would give rise to a right to relief." *Hutchinson ex rel. Baker v. Spink*, 126 F.3d 895, 900 (7th Cir. 1997).[10]

Demanding particularized facts, the Rules' framers understood, "leads to a waste of time while counsel and court attempt to pursue the will-o'-the wisp of pleading certainty," and it far too "often leads to a denial of justice," when meritorious claims are dismissed on the pleadings. Clark, *Simplified Pleading*, 2 F.R.D. at 457-458. That is why this Court's precedents allow a plaintiff to proceed who may be able to prove *any set of facts* to support the claim asserted.

---

[10] *Accord, e.g.*, *Kolupa v. Roselle Park Dist.*, 438 F.3d 713, 715 (7th Cir. 2006) ("complaints need not plead facts and need not narrate events that correspond to each aspect of the applicable legal rule" to survive a motion to dismiss); *In re Tower Air, Inc.*, 416 F.3d 229, 237 (3d Cir. 2005) ("By requiring [a plaintiff] to allege specific facts, the District Court erroneously preempted discovery on certain claims by imposing a heightened pleading standard not required by Federal Rule of Civil Procedure 8."); *Hoskins v. Poelstra*, 320 F.3d 761, 764 (7th Cir. 2003) ("Rule 8 does not require—or permit district judges to require—fact pleading."); *Palmer*, 46 F.3d at 688 ("[c]omplaints need not plead facts"); *Brownlee v. Conine*, 957 F.2d 353, 354 (7th Cir. 1992) ("The Federal Rules of Civil Procedure establish a system of notice pleading rather than of fact pleading, so the happenstance that a complaint is 'conclusory,' whatever exactly that overused lawyers' cliche means, does not automatically condemn it." (citation omitted)).

A. This Court Holds That Plaintiffs Are Not Required To Plead Facts Establishing Their Claims

Since the Federal Rules of Civil Procedure took effect in 1938, replacing both common-law pleading and code or "fact pleading" with the new rule of *notice pleading*, this Court has had many occasions to reiterate that plaintiffs are entitled to plead a case without detailing the facts that ultimately may be used to prove it. Rather, a claim is sufficient if a plaintiff might prove *any set of facts* that would entitle it to relief.

In *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), this Court held that "[i]n appraising the sufficiency of the complaint, we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim *unless it appears beyond doubt that the plaintiff can prove no set of facts* in support of his claim which would entitle him to relief."[11] Thus, there must be enough factual detail for the defendants to understand the nature of the case against them, and for the Court to hypothesize that *some* set of facts might be proved to warrant relief. But that is all. The respondents in *Conley* had argued "that the complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal [was] therefore proper." *Conley*, 355 U.S. at 47. "The decisive answer to this," this Court bluntly held, "is that the Federal Rules of Civil Procedure *do not require a*

---

[11] *Id.* at 45-46 (emphasis added). This was, as *Conley* noted, clearly "the accepted rule." *Id.* Early decisions were emphatic: "'The Rules of Civil Procedure do not require that a plaintiff shall plead every fact essential to his right to recover the amount of which he claims . . . . If it is conceivable that, under the allegations of his complaint, a plaintiff can, upon trial, establish a case which would entitle him to the relief prayed for, a motion to dismiss for insufficiency of statement ought not to be granted." *Sparks v. England*, 113 F.2d 579, 581-82 (8th Cir. 1940); *see The Complaint Under the Federal Rules of Civil Procedure*, 10 Fordham L. Rev. 252, 258-59 (1941) (quoting *Sparks*); Clark, *Handbook of the Law of Code Pleading*, § 38 at 242-43 & nn.104-105.

claimant to set out in detail the facts upon which he bases his claim." *Id.* (emphasis added). This Court found a claim under the Railway Labor Act sufficiently stated by employing conclusory or "general" allegations of discrimination. *Id.* Whether facts existed to flesh out and sustain those claims would have to be left to discovery. *See id.*

Nearly two decades later, in *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), this Court held again that a complaint cannot be dismissed because the plaintiff fails to plead facts showing that he or she will likely prevail. "Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test," the Court concluded, reiterating *Conley's* rule that "'a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Id.* at 236 (quoting *Conley*, 355 U.S. at 45-46).

In *Hishon v. King & Spalding*, 467 U.S. 69 (1984), this Court reiterated once more: "A court may dismiss a complaint only if it is clear that no relief could be granted *under any set of facts* that could be proved consistent with the allegations." *Id.* at 73 (citing *Conley*, 355 U.S. at 45-46) (emphasis added). And this is the standard that it has consistently applied—that a complaint cannot be dismissed if relief could be granted "under any set of facts" that the plaintiff might prove. *See, e.g., Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002) (quoting *Hishon*); *NOW v. Scheidler*, 510 U.S. 249, 256 (1994); *H. J., Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 249-50 (1989) (quoting *Hishon*); *Neitzke v. Williams*, 490 U.S. 319, 327 (1989) (quoting *Hishon*); *see also Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. 67, 98-99 (1989) (Stevens, J., joined by Scalia, J., concurring and dissenting in part) (quoting *Hishon*).

These decisions, allowing plaintiffs to proceed if "any set of facts" might be proved entitling them to relief, surely

foreclose Petitioners' argument that "it is the facts alleged, not unalleged facts that the plaintiff might later prove, that must support the claim to relief." Petitioners' Brief at 16. If a plaintiff might later prove "any of set facts" supporting the claim presented, then the complaint *must not be dismissed. Hishon*, 467 U.S. at 73; *accord Scheuer*, 416 U.S. at 236; *Conley*, 355 U.S. at 45-46. "At this stage the plaintiff receives the benefit of imagination, so long as the hypotheses are consistent with the complaint," as Judge Frank Easterbrook has aptly observed. *Sanjuan*, 40 F.3d at 251 (Easterbrook, J., citing *Conley*). "Matching facts against legal elements comes later." *Id.*

This Court restated this notice-pleading rule in *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990), in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992), and in *NOW*, 510 U.S. at 256. All three decisions reaffirmed "that 'at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim.'" *NOW*, 510 U.S. at 256 (quoting and following *Defenders of Wildlife*, 504 U.S. at 561 (quoting and following *National Wildlife Federation*, 497 U.S. at 889)).

The Court's decisions draw a sharp distinction between pleading a claim, when general or conclusory allegations suffice, and proving it—when facts are required. *National Wildlife Federation* and *Defenders of Wildlife* both held that to survive a Rule 56 motion for summary judgment the plaintiff must present specific facts supporting its claim. This, the Court emphasized, was in direct contrast to the requirements of 12(b)(6), that general allegations suffice, with any specific facts that might be needed to support the claim *presumed. See Nat'l Wildlife Fed'n*, 497 U.S. at 889 (citing *Conley*, 355 U.S. at 45-46). In *Defenders of Wildlife* this Court explained:

> At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presume that general allegations embrace those specific facts that are necessary to support the claim." *National Wildlife Federation, supra,* [497 U.S.] at 889. In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," Fed. Rule Civ. Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be "supported adequately by the evidence adduced at trial." [*Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 115 n. 31 (1979)].

Defenders of Wildlife, 504 U.S. at 561. Clearly, a plaintiff is not required to *plead* the facts that will later be required either to survive a summary judgment motion, or to prevail at trial.

Indeed, in *NOW*, the Court applied these principles to a motion to dismiss. Women's health clinics alleged that anti-abortion activists had "conspired to use force to induce clinic staff and patients to stop working and obtain medical services elsewhere." *NOW*, 510 U.S. at 256. Tracking RICO's statutory text, and in rather conclusory fashion, the "[p]etitioners claimed that this conspiracy 'has injured the business and/or property interests of the [petitioners].'" *Id.* at 256 (quoting complaint); *compare* 18 U.S.C. §1964(c) ("Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor . . . .").

Although the lower courts had dismissed the case, this Court reversed, explaining:

> We have held that "at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those

> specific facts that are necessary to support the claim." [*Defenders of Wildlife*, 504 U.S. at 561] (citations omitted). The District Court dismissed petitioners' claim that the pleading stage pursuant to Federal Rule of Civil Procedure 12(b)(6), so their complaint must be sustained if relief could be granted "*under any set of facts* that could be proved consistent with the allegations." [*Hishon*, 467 U.S. at 73].

NOW, 510 U.S. at 256 (emphasis added).

Thus, where a complaint states a potentially valid claim, the question is not whether facts necessary to support that claim have been pleaded, but whether "any set of facts"—whether or not specifically pleaded—might ultimately be proved that would entitle the plaintiff to relief. The plaintiff need not allege a specific fact for each element of the claim. *In re Tower Air*, 416 F.3d at 237.

B. Notice-Pleading Presumptions Apply With Particular Force To Antitrust Cases

Petitioners' contention that antitrust claims must meet a heightened standard are flatly at odds with this Court's controlling precedents. For this Court has repeatedly emphasized that notice-pleading principles apply *with particular force* to antitrust cases.

This Court's first opinion reviewing the sufficiency of a complaint following the adoption of the Federal Rules upheld general allegations of a conspiracy to drive billposting companies out of business in violation of the Sherman Act. The plaintiff charged that it "'has been damaged in that its business was rendered unprofitable, and the profits of its said trade and commerce have diminished, and the plaintiff company has suffered loss and been damaged thereby.'" *C.E. Stevens Co. v. Foster & Kleiser Co.*, 311 U.S. 255, 261 (1940). "While these allegations are general," this Court held, "we cannot say that they are inadequate," excusing

antitrust claimants from any requirement of pleading particularized facts. *Id.*

In *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 746 (1976), this Court held that dismissal at the pleading stage should be granted "very sparingly" in antitrust cases because "'the proof is largely in the hands of the alleged conspirators'" (quoting *Poller v. CBS*, 368 U.S. 464, 473 (1962)). The Court explained:

> We have held that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." [*Conley*, 355 U.S. at 45-46] (footnote omitted). And in antitrust cases, where "the proof is largely in the hands of the alleged conspirators," [*Poller*, 368 U.S. at 473], dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.

Hospital Bldg. Co., 425 U.S. at 746.

In *McLain v. Real Estate Board*, 444 U.S. 232 (1980), this Court deemed it "axiomatic that a complaint should not be dismissed unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief,'" holding once again that this rule of notice pleading applies "with no less force to a Sherman Act claim." *Id.* at 246 (quoting *Conley*, 355 U.S. at 45-46). Petitioners' contention that plaintiffs must meet a heightened standard for antitrust claims is flatly inconsistent with this Court's precedents.

Petitioners make much of a footnote of dictum from *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983), which dealt with claims of a construction workers' union that the antitrust laws were violated when members of a multi-employer association allegedly coerced their own customers and competitors to

give business to nonunion firms. *See id.* at 528 n.17; Christopher M. Fairman, *The Myth of Notice Pleading*, 45 Ariz. L. Rev. 987, 1013 (2003). This Court held that "the Court of Appeals properly assumed that such coercion might violate the antitrust laws," but that the union, which was not directly injured by the alleged conspiracy, was not the proper plaintiff. *Associated Gen. Contractors*, 459 U.S. at 528, 544-46. Obviously skeptical that the union could prove the conspiracy it alleged, this Court added in a footnote that had the district court employed its power—presumably under Rule 12(e)—to demand a more definite statement and "required the Union to describe the nature of the alleged coercion with particularity before ruling on the motion to dismiss, it might well have been evident that no violation of law had been alleged." *Associated Gen. Contractors*, 459 U.S. at 528 n.17. "In making the contrary assumption for purposes of our decision," the Court wrote in dictum, "we are perhaps stretching the rule of [*Conley*, 355 U.S. at 47-48], too far." *Id.* It applied *Conley* nonetheless.

In *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986), moreover, this Court formulated summary judgment standards against the background provided by notice-pleading rules that preclude termination of an antitrust case on a motion to dismiss:

> Before the shift to 'notice pleading' accomplished by the Federal Rules, motions to dismiss a complaint or to strike a defense were the principal tools by which factually insufficient claims or defenses could be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources. But with the advent of 'notice pleading,' the motion to dismiss seldom fulfills this function any more, and its place has been taken by the motion for summary judgment.

Celotex, 477 U.S. at 327.

The time for plaintiffs to produce facts supporting their claims is in response to a motion for summary judgment—after a reasonable opportunity for discovery. An antitrust case cannot be dismissed merely because plaintiffs do not plead facts proving their claims.

C. Notice Pleading Revisited: When Lower Courts Ignore This Court's Precedents

The significance of this Court's many notice-pleading precedents should have been clear. Yet lower courts have nonetheless from time to time fashioned heightened pleading standards that they thought were good policy.[12] Some courts decided that civil-rights claims against governmental officials, or against municipalities, should be subject to heightened pleading standards, for example, with the Fifth Circuit requiring plaintiffs to "state with factual detail and particularity the basis for the claim." *Elliott v. Perez*, 751 F.2d 1472, 1473 (5th Cir. 1985); *see also Boston & Maine*, 987 F.2d at 866; Fairman, *Heightened Pleading*, 81 Tex. L. Rev. at 575-82. Others demanded specific facts for antitrust claims—as in *Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 654 (7th Cir. 1984), when the Seventh Circuit brushed aside this Court's notice-pleading precedents on the ground that they cannot mean what they very clearly say.

With *Sutliff*, the Seventh Circuit expressly rejected the standard of *Conley* and *Scheuer*, that a complaint cannot be dismissed if the plaintiff might prove any set of facts supporting its claim, on the ground that this Court's oft-repeated formulation "has never been taken literally." *Sutliff*, 727 F.2d at 654. After denigrating this Court's standard, the

---

[12] *See Boston & Maine Corp. v. Town of Hampton*, 987 F.2d 855, 863-64 (1st Cir. 1993) (surveying cases); *Cash Energy, Inc. v. Weiner*, 768 F. Supp. 892, 897 (D. Mass. 1991) (surveying cases); *see generally*, Fairman, *Heightened Pleading*, 81 Tex. L. Rev. at 575-96; Fairman, *The Myth of Notice Pleading*, 45 Ariz. L. Rev. at 1011-62.

Seventh Circuit took as more "authoritative the statement in an earlier [district court] case that the pleader must 'set out sufficient factual matter to outline the elements of his cause of action or claim, proof of which is essential to his recovery.'" *Id.* (quoting *Daves v. Hawaiian Dredging Co.*, 114 F. Supp. 643, 645 (D. Haw. 1953)). Although this Court had held in *Hospital Building Co.*, 425 U.S. at 746, that antitrust cases should seldom be dismissed before discovery, the Seventh Circuit disagreed, citing "heavy costs of modern federal litigation, especially antitrust litigation." *Sutliff*, 727 F.2d at 654. If one "claims an antitrust violation, but the facts he narrates do not at least outline or adumbrate such a violation, he will get nowhere merely by dressing them up in the language of antitrust." *Id.*

This position—that plaintiff may be required to plead facts demonstrating a violation—was put to rest by this Court's decisions in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993), and *Swierkiewicz*, 534 U.S. 506.

In *Leatherman*, this Court unanimously reversed the Fifth Circuit for requiring a plaintiff pursuing civil rights claims to plead "all material facts establishing a plaintiff's right of recovery." *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 954 F.2d 1054, 1055 (5th Cir. 1992), *rev'd*, 507 U.S. at 167-69. This Court noted the Fifth Circuit's practice of requiring litigants pursuing civil rights claims against government officials to "'state with factual detail and particularity the basis for the claim.'" *Leatherman*, 507 U.S. at 167 (quoting *Elliott*, 751 F.2d at 1473). "In later cases, the Fifth Circuit extended this rule to complaints against municipal corporations asserting liability under § 1983." *Leatherman*, 507 U.S. at 167 (citing *Palmer v. San Antonio*, 810 F.2d 514 (5th Cir. 1987)). The Ninth Circuit, in stark contrast, had held that a "'"claim of municipal liability under [42 U.S.C.] section 1983 is sufficient to withstand a motion to dismiss even if the claim is *based on nothing*

more than a bare allegation that the individual officers' conduct conformed to official policy, custom, or practice.'"" *Leatherman*, 507 U.S. at 165 (quoting *Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 624 (9th Cir. 1988) (quoting *Shah v. County of Los Angeles*, 797 F.2d 743, 747 (9th Cir. 1986))).

This Court opted for the Ninth Circuit's rule, flatly rejecting the Fifth Circuit's as contrary to notice-pleading, reaffirming once more that the Federal Rules "'do not require a claimant to set out in detail the facts upon which he bases his claim.'" *Leatherman*, 507 U.S. at 168 (quoting *Conley*, 355 U.S. at 45-46. Only for averments of fraud or mistake does Rule 9(b) require a "greater particularity in pleading."). That Rule 9(b) specifies heightened pleading standards only for averments of fraud or mistake was dispositive: "*Expressio unius est exclusio alterius.*" *Leatherman*, 507 U.S. at 168. The Court concluded that heightening pleading requirements for any other allegations or claims—whether for civil rights or antitrust violations—"must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." *Id.*

Following this Court's decision in *Leatherman*, "the Advisory Committee on the Federal Rules of Civil Procedure, . . . rather pointedly, on October 21, 1993, rejected the idea of adding antitrust claims to the category of claims one must plead with particularity."[13] The Committee noted that "many courts have exacted heightened pleading requirements in specific types of litigation," including antitrust cases, often "without any explicit articulation or justification." *Minutes of the Advisory Committee on Federal Rules of Civil Procedure*, 1993 WL 761148, at *4. After discussing the values of notice pleading, the Committee suggested that "all that is needed is

---

[13] *In re Hydrogen Peroxide Antitrust Litig.*, 401 F. Supp. 2d 451, 458 (E.D. Pa. 2005) (citing *Minutes of the Advisory Committee on the Federal Rules of Civil Procedure*, 1993 WL 761148, at *6-*7 (Oct. 21, 1993)).

some means of encouraging greater use of tools already in the Rules," concluding that to "encourage more pleading motions may be less satisfactory." *Id.*, at *5. Indeed, "increasing the Rule 9 categories of claims that must be pleaded with particularity seemed undesirable to virtually all committee members who spoke to the question." *Id.*, at *6.

The Seventh Circuit, at least, got *Leatherman's* message, and reversed its previous course—holding "that judicial attempts to apply a heightened pleading standard in antitrust cases had been 'scotched' by the Supreme Court's decision in *Leatherman*," and "that after *Leatherman*, an antitrust plaintiff need not include 'the particulars of his claim' to survive a motion to dismiss. It is instead sufficient for the plaintiff to include in its complaint only 'a short and plain statement of the claim' showing an entitlement to relief."[14]

Yet some courts continued to require plaintiffs to allege the *proof* for some claims by pleading facts.[15] Some lower courts still applied heightened pleading standard to many civil rights claims.[16] Others did so in antitrust cases.[17]

---

[14] *MCM Partners v. Andrews-Bartlett & Assocs.*, 62 F.3d 967, 976 (7th Cir. 1995) (citing *Hammes v. AAMCO Transmissions*, 33 F.3d 774, 778, 782 (7th Cir. 1994) (noting that *Sutliff* "cannot be considered authoritative after *Leatherman*")); *see also Poindexter v. Nat'l Mortgage Co.*, No. 94 C 5814, 1995 U.S. Dist. LEXIS 5396, at *5-*6 (N.D. Ill. Apr. 18, 1995) ("[t]he Seventh Circuit's flirtation with heightened pleading requirements ended with the Supreme Court's reaffirmation of liberal pleading standards in *Leatherman*").

[15] *See* Fairman, *Heightened Pleading*, 81 Tex. L. Rev. at 583-90 (noting post-*Leatherman* circuit split); Fairman, *The Myth of Notice Pleading*, 45 Ariz. L. Rev. at 1018-20 (antitrust), 1029-30 (civil rights), 1035-36 (conspiracy); Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 Tex. L. Rev. 1749, 1763 & n.106 (1998) (listing cases).

[16] *See, e.g., Doe v. Hillsboro Indep. Sch. Dist.*, 81 F.3d 1395, 1402 & n.23 (5th Cir. 1996); *Branch v. Tunnell*, 14 F.3d 449, 455-57 (9th Cir. 1994); *Kimberlin v. Quinlan*, 6 F.3d 789, 794 n.9 (D.C. Cir. 1993), *cert. granted*, 513 U.S. 1123.

In *Swierkiewicz*, 534 U.S. at 511, this Court had to intervene once again, unanimously reversing Second Circuit precedent requiring employment discrimination plaintiffs to allege facts supporting a claim. Once more this Court had to say that "under a notice pleading system, *it is not appropriate to require a plaintiff to plead facts establishing a prima facie case*." *Id.* (emphasis added). Rule 8's "simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Id.* at 512. Through those provisions, any "attempted surprise in federal practice is aborted very easily, synthetic issues detected, and the gravamen of the dispute brought frankly into the open for the inspection of the court." *Id.* at 513 (quoting 5 Wright & Miller, *supra*, §1202, at 76).

It should be clear, then, that antitrust complaints need contain no evidentiary facts. "While courts had previously applied a heightened pleading requirement in antitrust cases, this view has subsequently been rejected in favor of applying Rule 8(a)'s notice pleading standard."[18]

---

[17] Fairman, *The Myth of Notice Pleading*, 45 Ariz. L. Rev. at 1018-20 & n.207 (citing *e.g.*, *Dickson v. Microsoft Corp.*, 309 F.3d 193, 212-13 (4th Cir. 2002); *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 220-22 (4th Cir. 1994); and *Syncsort Inc. v. Sequential Software, Inc.*, 50 F. Supp. 2d 318, 328 (D.N.J. 1999)).

[18] *Andrx Pharms., Inc. v. Elan Corp., PLC*, 421 F.3d 1227, 1234-1235 (11th Cir. 2005); *accord, e.g.*, *Lum v. Bank of Am.*, 361 F.3d 217, 220 (3d Cir. 2004) (antitrust claims "generally are not subject to the heightened pleading requirement of Rule 9(b)"); *MCM Partners*, 62 F.3d at 976 (*Le erman* "scotched" *Sutliff*); *In re Urethane Antitrust Litig.*, 409 F. Supp. 2d 1275, 1282 (D. Kan. 2005) ("heightened pleading standards do not apply to antitrust claims, particularly in light of the Supreme Court's reasoning in *Leatherman* and *Swierkiewicz*"); *see also United States v. LSL Biotechnologies*, 379 F.3d 672, 698-99 (9th Cir. 2004) (Aldisert, J. dissenting).

D. *Dura Pharmaceuticals* Works No Revolution In Pleading Standards

The Petitioners insist that *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), which dealt with requirements for proving and pleading loss in connection with a securities fraud claim, requires pleading of the facts that ultimately will be needed to support the plaintiff's claims, so that in antitrust cases, *any* "*pleading of conspiracy* requires factual allegations that directly support the existence of an agreement or, failing that, facts that support an inference that defendants conspired." Petitioners' Brief at 21 (emphasis added). But *Dura* merely holds that one who purchases a security at an inflated price thereby suffers no injury—for she might sell it at a similarly inflated price and suffer no loss. 544 U.S. at 342. Thus, a complaint asserting that investors purchased a security at an inflated price fails to plead a claim even under *Conley's* liberal notice-pleading rules. *Dura Pharms.*, 544 U.S. at 346-47. This Court emphasized that it "should not prove burdensome for a plaintiff who had suffered an economic loss to provide a defendant with *some* indication of the loss and the causal connection that the plaintiff has in mind." *Id.* at 347 (emphasis added); *see also In re Enron Corp. Sec. Derivative & ERISA Litig.*, 439 F. Supp. 2d 692, 700-01 & nn.9-10 (S.D. Tex. 2006).

II. UNDER FEDERAL RULE OF CIVIL PROCEDURE 9(b), CONSPIRATORIAL STATE OF MIND MAY BE AVERRED GENERALLY WITHOUT SETTING FORTH ANY FACTS FROM WHICH IT MIGHT BE INFERRED

Petitioners say that *any* "*pleading of conspiracy* requires factual allegations that directly support the existence of an agreement or, failing that, facts that support an inference that defendants conspired." Petitioners' Brief at 21 (emphasis added). This notion that plaintiffs must plead facts demonstrating a conspiratorial state of mind runs afoul not only of

this Court's notice-pleading precedents under Rule 8, *see supra*, it also conflicts with Rule 9(b)'s proviso that, whenever relevant, the "condition of mind of a person may be averred generally"—that is to say, without setting forth *any* evidentiary facts from which it might be inferred. Fed. R. Civ. P. 9(b).

Rule 9(b)'s Advisory Committee Notes direct those who wish to understand this provision to "[s]ee *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 19, r. 22," on which Rule 9(b) is based. And Order 19, Rule 22, states the underlying rule quite clearly: "Wherever it is material to allege malice, fraudulent intention, knowledge, or other condition of the mind of any person, it shall be sufficient to allege the same as a fact *without setting out the circumstances from which the same is to be inferred.*" The Annual Practice, Order 19, Rule 22 (1937) (emphasis added); *see generally*, Christopher M. Fairman, *An Invitation to the Rulemakers—Strike Rule 9(b)*, 38 U.C. Davis L. Rev. 281, 286-87 (2004).

From the beginning, leading treatises identified Rule 9(b)'s lineage and acknowledged its meaning. *See, e.g.*, 1 Palmer D. Edmunds, *Federal Rules of Civil Procedure*, Comment 49 at 432 (1938) (quoting Order 19, Rule 22 as Rule 9(b)'s source). Rule 9(b)'s principal drafter, the Reporter for the Federal Rules himself, the Honorable Charles E. Clark, confirmed in his *Handbook of the Law of Code Pleading*, §48 at 313 n.87, that Rule 9(b) was based on Order 19, Rule 22—and its proviso that facts indicating state of mind need not be pleaded.[19]

---

[19] Judge Clark also cited model Rules of Civil Procedure in the American Judicature Society Bulletin 14, 1919, art. 15 §18, which similarly provided:

> In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence,

From the outset, decisional law similarly recognized the obvious, applying Rule 9(b) to reject contentions that any facts must be alleged to show state of mind. In *Love v. Commercial Casualty Insurance*, 26 F. Supp. 481, 481-82 (S.D. Miss. 1939), for example, the plaintiff conclusorily asserted that a letter had been written with malice. The defendants insisted "that facts must be alleged in the complaint from which it can be inferred that the letter was written in fact with malice, and to aver generally that it was maliciously written is not sufficient as being a conclusion of the pleader." *Id.* at 481-82. The district court rejected such contentions, noting that Rule 9(b) "is very clear and is not open to any such construction as contended for by the defendants." *Id.* at 482. "This rule very probably was adopted from the rules of the Supreme Court of England, Order XIX, Rule 22, which provides that whenever it is material to allege malice, etc., it shall be sufficient to allege [the] same as fact without setting out the circumstances from which it is to be inferred." *Id.* at 482 (citing *Sargeaunt v. Cardiff Junction Dry Dock Co.*, (1926) W.N. 263).

> the facts must be stated with full particularity, but whenever it is material to allege malice, fraudulent intention, knowledge, or other condition of the mind of any person, it shall be sufficient to allege the same as a fact, without setting out the circumstances from which the same is to be inferred.

Clark, *Handbook of the Law of Code Pleading*, § 48 at 313 n.87 (quoting *Rules of Civil Procedure*, Am. Jud. Soc. Bull. 14, 1919, art. 15 §18). The model was embraced by several states. *See, e.g., Ingalls v. Raklios*, 21 N.E. 2d 856, 857 (Ill. Ct. App. 1939) (quoting Ill. Mun. Ct. Rule 72: "Whenever it is material to allege malice, fraudulent intention, knowledge or other condition of mind, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred."), *rev'd*, 26 N.E. 2d 468 (Ill. Sup. Ct. 1940); *Broxmeyer v. Polikoff*, 39 Pa. D. & C. 224, 231 (C.P. Phila. County 1940) (quoting Common Pleas Rule 50: "Whenever it is material to allege . . . intent, knowledge or other condition of mind of any person, it shall be sufficient to allege the same as fact without setting out the circumstances from which the same is to be inferred.").

Some Second Circuit decisions, in derogation of Rule 9(b)'s command, began to require plaintiffs alleging securities fraud to plead facts raising "a strong inference of scienter."[20]

In *In re GlenFed, Inc. Securities Litigation*, 42 F.3d 1541, 1545 (9th Cir. 1994) (*en banc*) the Ninth Circuit convened *en banc* to construe Rule 9(b) in light of its history and the drafters' intent. The Court acknowledged Order 19, Rule 22 as "[t]he model for Rule 9(b)," and observed that the "Second Circuit's test is . . . irreconcilable with the second sentence of Rule 9(b)," which permits state of mind in all cases to be "averred generally." *GlenFed*, 42 F.3d at 1545. Requiring plaintiffs to plead facts raising any inference of scienter "conflicts both with the English rule which was the model for Rule 9(b) and with the second sentence of Rule 9(b) itself, which declares unequivocally that state of mind may be averred generally and says absolutely nothing about required inferences." *Id.* at 1546.

Whether the Second Circuit's more-demanding pleading standard might be good policy was "beside the point," in light of this Court's holding in *Leatherman* that such a result "'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'" *Id.* (quoting *Leatherman*, 507 U.S. at 168). "We are not permitted to add

---

[20] *See, e.g., O'Brien v. Nat'l Prop. Analysts Partners*, 936 F.2d 674, 676 (2d Cir. 1991); *Ross v. A. H. Robins Co.*, 607 F.2d 545, 588 (2d Cir. 1979); *see also* Marcus, *The Puzzling Persistence of Pleading Practice*, 76 Tex. L. Rev. at 1760 ("Not only did it contradict the rule, the Second Circuit's approach also thrust upon the courts the difficult problem of defining a 'strong inference' of scienter."); Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 Colum. L. Rev. at 447-48, 485 (an "ironic result"); William S. Lerach & Eric Alan Isaacson, *Pleading Scienter Under Section 21D(b)(2) of the Securities Exchange Act of 1934: Motive, Opportunity, Recklessness, and the Private Securities Litigation Reform Act of 1995*, 33 San Diego L. Rev. 893, 906 & n.77 (1996).

new requirements to Rule 9(b) simply because we like the effects of doing so," wrote the *en banc* court, in an exercise of judicial restraint. *Id.* "This is a job for Congress, or for the various legislative, judicial and advisory bodies involved in the process of amending the Federal Rules." *Id.*

Congress, of course, acted in 1995, enacting the Private Securities Litigation Reform Act to require that in private actions under the Securities Exchange Act of 1934, plaintiffs shall be required to plead facts raising a strong inference of scienter: "In any private action arising under this title in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall . . . state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. §78u-4(b).[21]

Notably, Congress chose to alter pleading standards *only* for securities fraud claims arising under the 1934 Act but not for any other claims—not even for ones arising under the Securities Act of 1933. The PSLRA enacted other reforms—to class-action procedures—adding parallel provisions to both the 1933 and 1934 Acts. *See* Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. No. 104-67, §101, 109 Stat. 737-49 (1995); *compare* 15 U.S.C. §77z-l with 15 U.S.C. §78u-4. It also enacted parallel provisions concerning liability for forward-looking statements in both the 1933 and 1934 Acts. *Compare* 15 U.S.C. §77z-2 *with* 15 U.S.C. §78u-5. But *only* 1934 Act claims are subject to heightened pleading standards of any kind. *See* 15 U.S.C. §78u-4(b); *see generally* Hillary A. Sale, *Heightened Pleading and Discovery Stays: An Analysis of the Effect of the PSLRA's Internal*

---

[21] *See generally* John Avery, *Securities Litigation Reform: The Long and Winding Road to the Private Securities Litigation Reform Act of 1995*, 51 Bus. Law. 335, 345-47, 357-58 (1996); Lerach & Isaacson, *supra*, 33 San Diego L. Rev. at 893, 906-07.

Information Standard on '33 and 34 Act Claims, 76 Wash. U. L.Q. 537, 583-90 (1998).

That Congress chose to adopt a narrowly limited heightened pleading requirement—overriding Rule 9(b)'s proviso that state of mind may be generally averred—*only* for securities fraud cases under the 1934 Act should be dispositive: "'*Expressio unius est exclusio alterius.*'" *Swierkiewicz*, 534 U.S. at 513 (quoting *Leatherman*, 507 U.S. at 168). Petitioners can point to no similar legislative action authorizing heightened pleading standards for antitrust claims. Accordingly, conspiratorial state of mind may be "generally averred" under Rule 9(b), without setting forth any facts from which it might be inferred.

CONCLUSION

This is no time to abandon the notice-pleading principle adopted in the Federal Rules in 1938, and restated so many times by this Court's rulings—that plaintiffs need not plead the facts necessary to prove their case. Requiring fact pleading is particularly inappropriate in cases that deal with complex conspiracies stretching over months or years. In a civil rights case, Judge Easterbrook explained for the Seventh Circuit:

> The district court dismissed the complaint to the extent it sought relief from the nine individual defendants, observing that "the complaint does not . . . say of any defendant, as an individual, that he or she has done something." Nor did it need to. Complaints need not plead facts . . . . It is enough to specify the wrong done and leave details to later steps, such as motions for more definite statement, Fed. R. Civ. P. 12(e), and affidavits concerning summary judgment. When a collective body such as a school district takes a complex series of actions over a span of years, it may be difficult to pin down individual responsibility without discovery. If the complaint cannot survive a motion under Rule 12(b)(6) until each person's role is known, however, it may be impossible as a practical matter to obtain complete

relief. The school desegregation claim should proceed against all of the original defendants.

Palmer, 46 F.3d at 688 (citations omitted).

Antitrust conspiracies are apt to be all the more complex—and surreptitious. Plaintiffs should not be required to plead particularized facts prior to discovery.

Respectfully submitted,

MARY JANE FAIT
WOLF HALDENSTEIN ADLER
FREEMAN & HERZ, LLP
55 West Monroe Street, Suite 1111
Chicago, IL 60603
(312) 984-0000

ERIC ALAN ISAACSON *
MARK SOLOMON
CHRISTOPHER M. BURKE
TAMI FALKENSTEIN HENNICK
LERACH COUGHLIN STOIA
GELLER RUDMAN &
ROBBINS LLP
655 West Broadway, Suite 1900
San Diego, CA 92101
(619) 231-1058

* Counsel of Record

Counsel for Amici Curiae Legal Scholars Debra Lyn Bassett, Joseph P. Bauer, John S. Beckerman, Kevin M. Clermont, William V. Dorsaneo III, Christopher M. Fairman, Jackie Gardina, Susan Harthill, Allan Ides, Danne L. Johnson, David Levine, Tyler T. Ochoa, Stephen A. Saltzburg, Gregory C. Sisk, Joan E. Steinman, Jeffrey W. Stempel, Beth Stephens and Elizabeth G. Thornburg, and for Certain Purchasers of Elevators and Elevator Maintenance Services, Including Transhorn Ltd., et al.

October 13, 2006

623A

(12)

Supreme Court, U.S.
FILED
AUG 25 2006
OFFICE OF THE CLERK

No. 05-1126

IN THE

Supreme Court of the United States

BELL ATLANTIC CORPORATION, ET AL.,

Petitioners,

v.

WILLIAM TWOMBLY, ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* LEGAL SCHOLARS IN SUPPORT OF PETITIONERS

PAUL J. STANCIL
504 E. Pennsylvania Ave.
Champaign, Illinois 61820
(217) 333-0931

MAX HUFFMAN*
Clifton Ave. and Calhoun St.
Room 2M20
Cincinnati, Ohio 45221
(513) 556-0116

**Counsel of Record*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

STATEMENT 3

A. The Litigation 3

B. The Opinions Below 4

SUMMARY OF ARGUMENT 6

ARGUMENT 7

I. Rules 8(a)(2) and 12(b)(6) Ensure that Defendants Have "Fair Notice" and that Courts Can Dismiss Complaints That Do Not Show Entitlement to Relief 8

A. The Second Circuit's Open-Ended Pleading Standard Ignores the Plain Language of the Relevant Federal Rules 8

B. The Court Should Clarify That Rule 8(a)(2), Combined With the Rule 8(f) Instruction To Construe Pleadings To Do "Substantial Justice," Permits Courts Leeway When Considering Complaints in Extreme Cases . 13

II. For an Entitlement to Relief to Be Warranted by Sherman Act § 1, the Facts Pleaded Must "Tend to Exclude the Possibility" of Independent Conduct 19

TABLE OF CONTENTS—Cont'd

B. To Support an Inference of a Conspiracy, Allegations of Fact Must "Tend to Exclude the Possibility" of Legitimate Unilateral Conduct 23

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

Cases

Anti-Monopoly, Inc. v. *Hasbro, Inc.*, 1996 WL 22976 (S.D.N.Y. Jan. 23, 1996) 17

Apex Oil Co. v. *DiMauro*, 822 F.2d 246 (2d Cir. 1987) 25

Associated General Contractors of Cal. v. *California State Council of Carpenters*, 459 U.S. 519 (1983) 7, 9, 15, 16, 18

Barry Wright Corp. v. *ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983) 23

Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975) 15, 18

Brooke Group Ltd. v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) 7, 20

Car Carriers, Inc. v. *Ford Motor Co.*, 745 F.2d 1101 (7th Cir. 1984) 16

Conley v. *Gibson*, 355 U.S. 41 (1957) ..... *passim*

Dioguardi v. *Durning*, 139 F.2d 774 (2d Cir. 1944) 15

DM Research, Inc. v. *College of American Pathologists*, 170 F.3d 53 (1999) 14

Dura Pharms., Inc. v. *Broudo*, 544 U.S. 336 (2005) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page(s)

Heart Disease Research Found. v. *General Motors Corp.*, 463 F.2d 98 (2d Cir. 1972) 14

In re Baby Food Antitrust Litig., 166 F.3d 112 (3d Cir. 1999) 21

In re Flat Glass Antitrust Litig, 385 F.3d 350 (3d Cir. 2004) 26

Leatherman v. *Tarrant Cty. Narcotics Intelligence & Coord. Unit*, 507 U.S. 163 (1993) 2, 8, 18

Matsushita Elec. Indus. Co. v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) ..... *passim*

Mitchael v. *Intracorp, Inc.*, 179 F.3d 847 (10th Cir. 1999) 25

Monsanto Co. v. *Spray-Rite Servs. Corp.*, 465 U.S. 752 (1984) ..... *passim*

NYNEX Corp. v. *Discon, Inc.*, 525 U.S. 128 (1998) 19

Pavelic & LeFlore v. *Marvel Entertainment Group*, 493 U.S. 120 (1989) 9

Sutliff, Inc. v. *Donovan Cos.*, 727 F.2d 648 (7th Cir. 1984) 14, 16

Swierkiewicz v. *Sorema N.A.*, 534 U.S. 506 (2002) 1, 9, 10, 15, 18

TABLE OF AUTHORITIES—Continued

Page(s)

Tal v. *Hogan*, 453 F.3d 1244 (10th Cir. 2006) 14

Theatre Enters., Inc. v. *Paramount Film Distrib. Corp.* 346 U.S. 537 (1954) 2, 3, 7, 19, 20

Verizon Communications, Inc. v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) 4, 19, 27, 28

Wilson v. *Rousseau*, 45 U.S. 646 (1846) 11

Wynder v. *McMahon*, 360 F.3d 73 (2d Cir. 2004) 9

Statutes and Rules:

15 U.S.C. § 1 ..... *passim*

15 U.S.C. § 2 ..... 4, 27, 28

Fed. R. Civ. P. 1 19

Fed. R. Civ. P. 8 ..... *passim*

Fed. R. Civ. P. 12 ..... *passim*

Miscellaneous:

Philip E. Areeda, Antitrust Analysis (3d ed. 1981) 26

Joseph P. Bauer & William H. Page, Kintner's Federal Antitrust Law (2d ed. 2002) 21, 24, 26, 27

TABLE OF AUTHORITIES—Continued

Page(s)

Robert H. Bork, The Antitrust Paradox (1978) 22

Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177 (1958) 13

Charles E. Clark, *Special Pleading in the "Big Case"*, 21 F.R.D. 45 (1957) 12, 14

Claim or Cause of Action, 13 F.R.D. 253 (1952) 12, 13

Frank Easterbrook, *Discovery as Abuse*, 69 B.U. L. Rev. 635 (1989) 16, 17

Einer Elhauge & Damien Geradin, Global Antitrust Law & Econ. (forthcoming Foundation Press) 24, 25

Richard A. Epstein, *Motions to Dismiss in Antitrust Cases: Separating Fact from Fantasy*, AEI-Brookings Related Pub. No. 06-08 (2006) ..... *passim*

Christopher M. Fairman, *The Myth of Notice Pleading*, 45 Ariz. L. Rev. 987 (2003) 13, 14

Henry Friendly, Federal Jurisdiction: A General View (1973) 17

Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 Tex. L. Rev. 1665 (1998) 10

TABLE OF AUTHORITIES—Continued

Page(s)

Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules*, 86 Colum L. Rev. 433 (1986) 8, 14

Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 Duke L.J. 561 (2001) 17

Paul J. Stancil, *Atomism and the Private Merger Challenge*, 78 Temple L. Rev. 949 (2005) 18

Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655 (1962) 19

William H. Wagener, Note, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. Rev. 1887 (2003) 16, 17

Kenneth J. Withers, *Computer-Based Discovery in Federal Civil Litigation*, 2000 Fed. Cts. L. Rev. 2 17

Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure (3d ed. 2004) 9, 10, 13

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae Legal Scholars take seriously their responsibility to assist in the orderly and rational development of the law through their scholarship as well as through participation in the litigation process on matters of great import. We are admonished that lawyers should contribute in the "important * * * public service role * * * of the lawyer as law reformer." Stephen Breyer, *Our Civic Commitment*, Remarks at the Annual Meeting of the American Bar Association (2001). *Amici* thus submit this brief to assist the Court in this case of tremendous practical and legal significance.

Amici are law professors and legal scholars who teach and write in the areas of antitrust and civil procedure. *Amici* include Richard A. Epstein, James Parker Hall Distinguished Service Professor of Law, University of Chicago Law School; Max Huffman, Visiting Assistant Professor of Law, University of Cincinnati College of Law; Christo Lassiter, Professor of Law, University of Cincinnati College of Law; and Paul Stancil, Visiting Assistant Professor of Law, University of Illinois College of Law at Urbana-Champaign.

Amici are concerned that the panel opinion below relies on a reading of this Court's precedents, including *Conley* v. *Gibson*, 355 U.S. 41 (1957), and *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506 (2002), that is not supportable on a careful reading

---

[1] Under Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been lodged with the Clerk of the Court. Under Rule 37.6 of the Rules of this Court, *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief. Funds provided by the University of Cincinnati College of Law paid the cost of printing this brief.

of those cases. Indeed, the panel's rule—that allegations are sufficient to meet the standard of Federal Rule of Civil Procedure 8(a)(2) so long as they do not affirmatively exclude the possibility of a plaintiff's having a claim—is a *reductio ad absurdum* of the language this Court employed in *Conley*, and fails to heed the text of the rule. This Court has admonished that the rules of procedure mean what they say. See *Leatherman* v. *Tarrant Cty. Narcotics Intelligence & Coord. Unit*, 507 U.S. 163, 167-168 (1993). The standard followed by the panel violates that admonition by writing out of the rules the power of a district court to dismiss a plaintiff's suit for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).

The panel's new standard also undermines decades of development of antitrust and economic thought, reflected in this Court's decisions including *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), *Monsanto Co.* v. *Spray-Rite Services Corp.*, 465 U.S. 752 (1984), and *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537 (1954). Courts and scholars long have recognized that parallel conduct by competitors does not raise red flags about the possibility of illegal concerted action. The oft-recognized and well-understood danger of "false positives" imposing dead-weight costs on the economy as a whole—see, *e.g.*, Richard A. Epstein, *Motions to Dismiss in Antitrust Cases: Separating Fact from Fantasy*, AEI-Brookings Related Pub. No. 06-08, at 3-4 (2006)—militates in favor of standards that do not penalize legitimate business conduct. Allegations of parallel conduct, while not necessarily inconsistent with illegal concerted activity, do nothing to "tend to exclude the possibility" (*Monsanto*, 465 U.S. at 764)—indeed, the *probability* (Epstein, Related Pub. 06-08, *supra*, at 4)—of unilateral business conduct.

Amici believe the Court should reverse the decision of the Second Circuit below and state a rule that (1) gives effect to the plain language and clear import of the Federal Rules of Civil

Procedure, and (2) respects well-established antitrust doctrine based on decades of economic understanding about competitors' conduct.

STATEMENT

It is appropriate that this case arises at the interplay between the rules for pleading and dismissing cases under the Federal Rules of Civil Procedure, Rules 8(a)(2) and 12(b)(6), and the doctrine relating to conspiracies to restrain trade in violation of Sherman Act § 1, 15 U.S.C. § 1. The modern conceptions of the two legal schemes are both creatures of the last half-century. See *Conley* v. *Gibson*, 355 U.S. 41 (1957) (pleading standards under Rule 8); *Theatre Enters., Inc.* v. *Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954) (standards for circumstantial evidence of a conspiracy). Both schemes provide mechanisms to compensate for injury and deter injurious conduct. Both present dangers of abuse that can summon drastic social ills.

But properly understood, the modern rules governing the pleading standard under the federal rules and the understanding of conspiracy under § 1 dovetail neatly. Together they prescribe the means by which potentially meritorious antitrust litigation can proceed to discovery and trial, and litigation that is not based on any reasonable belief of wrongful conduct can be stopped before excessive waste occurs.

A. The Litigation

The interplay between Rule 8 and the requirements for proving a conspiracy under § 1 came before the courts below in the context of a suit alleging a conspiracy among providers of local telephone and Internet services. Respondents claimed petitioners conspired to do two things: (1) to prevent entry by competitors into their respective markets, and (2) not to enter each others' markets in competition with one another. JA 27. The result, respondents alleged, was that petitioners maintained monopolies in their geographic markets and consumers were injured. See JA 31.

The industry at issue in this case is one marked by a complex history of regulated monopoly and, over the past decade, torturous deregulation. Petitioners' respective service markets exist largely because until February 8, 1996—the date of President Clinton's signing the Telecommunications Act of 1996 into law—their monopolies in those markets were protected by state law. Pet. App. 37a. One result of deregulation has been to create two types of business model for firms seeking to provide local telecom services. One model is essentially the traditional local telephone provider, which are incumbent firms (called ILECs) serving the regions in which, before deregulation, they often had exclusive franchises under state law. Pet. App. 37a. The other model is a class of competitors (called CLECs) who seek to serve customers now that markets have been opened to competition. Pet. App. 37a-38a.

Respondents brought this action originally as a Sherman Act § 2 (15 U.S.C. § 2) claim against one of the petitioners, alleging unilateral exclusionary conduct of the nature alleged by the plaintiff in *Verizon Communications, Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). See Pet. 4. The claims became claims of conspiracy to exclude competitors and conspiracy not to compete after this Court held in *Trinko*, 540 U.S. at 408, a § 2 claim was not cognizable in the context of the Telecommunications Act of 1996. See Pet. 4-5.

B. The Opinions Below

In a careful and scholarly opinion on petitioners' motion to dismiss under Rule 12(b)(6), Judge Gerard Lynch of the Southern District of New York dismissed respondents' complaint. The court viewed the Rule 8(a)(2) pleading standard through the lens of § 1. Pet. App. 40a. Because "the Supreme Court 'has never held that proof of parallel business behavior * * * itself constitutes a Sherman Act offense,'" Judge Lynch noted the court's responsibility to "distinguish between conduct that represents the natural convergence of competitors' market behavior, and conduct that appears to have been taken pursuant

to an agreement." Pet. App. 41a (quoting *Theatre Enters.*, 346 U.S. at 541). Judge Lynch turned to the "plus factor" framework that courts of appeals broadly hold defines the distinction this Court has drawn[2] between innocent parallel conduct and circumstantial evidence of collusion. Pet. App. 42a. To Judge Lynch, the plus factors were shorthand for respondents' responsibility to "assert facts that, if true, support the existence of a conspiracy." Pet. App. 42a.

Judge Lynch noted respondents' specific allegations did nothing to advance the complaint beyond merely alleging parallel conduct. Everything respondents alleged was explainable as legitimate exercises of independent business judgment by petitioners. The Gerrymandered appearance of petitioners' territorial markets—which "might be enough in itself to support an inference of conspiracy, *in most industries*"—in the telecom industry is the result of historical accident. Pet. App. 47a (emphasis added). The parallel conduct in being inhospitable to entry by CLECs into their respective markets "would be in each ILEC's individual economic interest." Pet. App. 48a. The parallel conduct in collectively not entering each others' markets as CLECs readily was explainable by the fundamentally different nature of the CLEC business model ("essentially middlemen, buying network time from ILECs * * * and selling it for a profit") from the ILEC business model. Pet. App. 51a-54a. And respondents themselves alleged that "becoming a CLEC is an extraordinarily difficult enterprise." Pet. App. 54a, 55a.

Finally, the court disposed of two allegations: one a quote by a CEO of one of the petitioners which, taken in the entire context of his statement, spoke to unilateral best interest and not to a conspiracy (Pet. App. 56a), and the other a blanket allegation made on information and belief that petitioners had

---

[2] See *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

conspired, which courts uniformly reject as insufficient to meet a plaintiff's pleading burden (Pet. App. 42a).

In an opinion by Judge Sack, a panel of the Second Circuit believed factual allegations that were ambiguous as to whether conduct was legitimate or illegal were sufficient to survive a motion to dismiss. Pet. App. 25a. "[A] court would have to conclude that there is *no set of facts* that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence." Pet. App. 25a (emphasis added). Acknowledging that to survive summary judgment, a § 1 plaintiff must provide evidence "'that tends to exclude the possibility'[3] that the alleged conspirators acted independently," the court held this standard was unique to the summary judgment stage. Pet. App. 24a.

SUMMARY OF ARGUMENT

The interplay of Rule 8 and the substantive standards for a violation of § 1 mandate reversal of the panel opinion.

I. Rule 8 codifies a standard of pleading under which complaints that provide proper notice and show the pleaders' entitlement to relief are sufficient to permit the litigation to proceed to discovery. But Rule 8 is not an open door. The minimal standards for pleading codified by the rule and recognized by this Court in *Conley* v. *Gibson*, 355 U.S. 41 (1957), and other cases, operate to ensure (1) notice to a defendant, and (2) a court's ability to dismiss cases in which the allegations do not show a right to a remedy. That understanding of the pleading standards comports with the plain language of Rule 8(a)(2) and Rule 12(b)(6). Although the broad language this Court employed in *Conley* has been cited in favor of open-ended pleading, this Court since has made clear the pleading standards have teeth. Likewise, Rule 8(f) prescribes that pleadings "*shall* be so construed as to do substantial justice." (Emphasis added.)

---

[3] *Matsushita*, 475 U.S. at 588.

II. Applying the pleading requirements in the context of a § 1 claim, a plaintiff's factual allegations must give rise to an inference of a conspiracy. No dispute exists in this case that conscious parallel conduct by competitors does not constitute an agreement. To show entitlement to relief, a plaintiff must plead facts that "tend to exclude the possibility" that the defendant acted in its unilateral best interest. This pleading burden is an application of the "plus factors" framework, but the plus factor framework, which includes facts that do not necessarily relieve ambiguity about the conduct alleged, is not necessarily sufficient. The appropriate standard is the one this Court recognized in *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), and *Monsanto Co.* v. *Spray-Rite Services Corp.*, 465 U.S. 752 (1984). A plaintiff must plead facts that tend to exclude the possibility of innocent conduct.

ARGUMENT

The Court should reverse the decision below. This case presents an opportunity to announce a rule that reconciles a seeming—but illusory—tension between the liberal standard for pleadings the Court unanimously announced in *Conley* v. *Gibson*, 355 U.S. 41 (1957), and the Court's recent, also unanimous, recognition that the requirement that a plaintiff prove an ultimate fact implies a requirement that the plaintiff allege that fact. *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 346 (2005) (supporting the holding by citing to *Conley*, 355 U.S. at 47); see also *Associated General Contractors of Cal.* v. *California State Council of Carpenters*, 459 U.S. 519, 526 (1983) ("It is not * * * proper to assume the [plaintiff] can prove facts that it has not alleged * * *.").

The Court's holding also should reaffirm the wisdom underlying its decisions in *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993),*Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), *Monsanto Co.* v. *Spray-Rite Services Corp.*, 465 U.S. 752 (1984), and *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537 (1954), that conscious parallel

conduct by competing firms is not illegal. The pleading standard under Rule 8(a)(2) requires allegations of facts supporting an inference of conduct that provides a basis for a remedy.

I. Rules 8(a)(2) and 12(b)(6) Ensure that Defendants Have "Fair Notice" and that Courts Can Dismiss Complaints That Do Not Show Entitlement to Relief

The Federal Rules of Civil Procedure state standards for the sufficiency of respondents' statement of claims. Fed. R. Civ. P. 8(a)(2). They provide a mechanism for courts to dismiss claims that are insufficient. Fed. R. Civ. P. 12(b)(6). They require courts to construe pleadings in a manner "as to do substantial justice." Fed. R. Civ. P. 8(f). The rules are not mere toothless tigers. They exist to ensure that a defendant is not subjected to the Kafka-esque difficulties of defending against suit without knowing what it did that gave rise to a plaintiff's claims. See *Conley*, 355 U.S. at 46 (defendant entitled to "fair notice of what the plaintiff's claim is and the grounds upon which it rests"). The rules also exist to provide district courts means to dismiss suits that are not justified by reference to governing legal standards. See *Dura*, 544 U.S. at 346 (allegation of harm must comport with the sort of harm recognized by the governing legal scheme). See also Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules*, 86 Colum. L. Rev. 433, 436 (1986) (arguing the purpose of pleading should be better to enable courts to decide cases on the merits).

A. The Second Circuit's Open-Ended Pleading Standard Ignores the Plain Language of the Relevant Federal Rules

This Court unanimously held in *Leatherman* v. *Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993), that Rule 8 "mean[s] what it sa[ys]." *Id.* at 168. The rules are not subject to amendment by judicial interpretation. *Ibid.* "We give the Federal Rules of Civil

Procedure their plain meaning, and generally with them as with a statute, '[w]hen we find the terms * * * unambiguous, judicial inquiry is complete * * *.'" *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 493 U.S. 120, 123 (1989) (quoting *Rubin* v. *United States*, 449 U.S. 424, 430 (1981)) (other citations omitted). The Court need look no further than the rules that govern respondents' complaint and petitioners' motion to dismiss to reverse the court below.

1. "[I]n order to satisfy the requirements of Rule 8(a) the pleading must contain something more by way of a claim for relief than a bare averment that the pleader wants compensation and is entitled to it * * *." 5 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 1216, at 235-236 (3d ed. 2004). Rule 8(a)(2) requires "a short and plain statement of the claim *showing that the pleader is entitled to relief*." (Emphasis added.) In *Dura*, this Court unanimously held a failure to allege the plaintiff's loss was proximately caused by the defendant's illegal conduct warranted dismissal of the complaint. 544 U.S. at 346-347 (interpreting the basic Rule 8(a)(2) pleading standard). *Dura* commands the conclusion that a plaintiff must allege facts making out each element of its claim. "Our holding about plaintiffs' need to *prove* proximate causation and economic loss leads us also to conclude that the plaintiffs' complaint here failed adequately to *allege* these requirements." *Id.* at 346. This unanimous holding was rendered with full cognizance of the liberal pleading standards discussed in *Conley* and *Swierkiewicz*. *Dura*, 544 U.S. at 346-347 (citing *Conley*, 355 U.S. at 47, and *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506, 513-515 (2002)). See also *Associated General Contractors*, 459 U.S. at 526 (a plaintiff should not be permitted to prove facts not alleged).

The court of appeals gave *Dura* only passing mention. Pet. App. 13a. It relied instead on this Court's decision in *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506 (2002), for the propositions that antitrust actions are not "instances requiring * * * particularized pleadings" (Pet. App. 13a) and that "'Rule

8 pleading is extremely permissive.'" Pet. App. 14a (quoting *Wynder* v. *McMahon*, 360 F.3d 73, 77 (2d Cir. 2004)). Seizing on those non-controversial propositions, the court ignored the analysis by Judge Lynch of why *Swierkiewicz* does not control this case. Pet. App. 43a-45a. Simply, *Swierkiewicz* held a plaintiff is not required to plead the entirety of a burden-shifting analysis when making a claim of discrimination on the basis of national origin in violation of Title VII and the ADEA. 534 U.S. at 510-512. This is because the burden-shifting analysis "is an evidentiary standard, not a pleading requirement," (*id.* at 510), and it is possible to prove a violation of Title VII through direct evidence, bypassing the burden-shifting requirement. *Id.* at 511-512. But as Judge Lynch recognized, nothing about *Swierkiewicz* removes a plaintiff's responsibility to allege facts "showing" the plaintiff's entitlement to relief. Pet. App. 44a.

2. Some courts and commentators have been misled by language this Court employed in *Conley* to hold that so long as the plaintiff's complaint does not affirmatively demonstrate the plaintiff is *not* entitled to relief, a motion to dismiss must be denied. See, *e.g.*, Pet. App. 11a, 25a. Taking at face value the "no set of facts" standard, as the court of appeals apparently did, produces absurd results. "Literal compliance with *Conley* v. *Gibson* could consist simply of giving the names of the plaintiff and the defendant, and asking for judgment." Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 Tex. L. Rev. 1665, 1685 (1998).

Amici believe *Conley* did not actually announce such a non-standard. "Implicit in [*Conley*] is the notion that the rules do contemplate a statement of the circumstances, occurrences, and events in support of the claim being presented." 5 Wright & Miller, Fed. Prac. & Proc., *supra*, § 1215, at 194. But examining briefly the contours of the panel's approach produces exactly the same absurd result that Professor Hazard observed could arise from an unschooled reading of *Conley*. The panel held that to dismiss the complaint, there could be "no set of facts that would permit a plaintiff to demonstrate that the

particular parallelism asserted was the product of collusion rather than coincidence." Pet. App. 25a; see also Pet. App. 19a ("[t]he factual predicate that is pleaded does need to include conspiracy among the realm of plausible possibilities"). So long as an illegal conspiracy is "among the realm of plausible possibilities" from the allegations, the panel would hold them sufficient. Pet. App. 19a. That understanding of Rule 8(a)(2) is tantamount to saying a plaintiff can plead perfectly innocent conduct, and be entitled to discovery to determine whether there might be illegal conduct on which to state a claim.

That approach, if it is correct, would write the Rule 12(b)(6) procedure out of the federal rules. Rule 12 recognizes district courts have power to dismiss cases before an answer is filed. Dismissal explicitly is appropriate if the complaint "fail[s] to state a claim on which relief can be granted." Rule 12(b)(6). If a complaint were sufficient any time it did not affirmatively demonstrate its own insufficiency, as the panel below held, district courts would in almost every case lack the power to dismiss for failure to state a claim explicitly granted by Rule 12. The Court ought not accept an interpretation of Rule 8 that is inconsistent with the plain language of Rule 12.[4]

The Second Circuit's approach also cannot be reconciled with this Court's unanimous opinion in *Dura*. The complaint in that case was insufficient because it did not allege loss causation. But had the panel below analyzed that complaint, it would have been upheld. It would have been theoretically possible for the plaintiffs in *Dura*, like respondents in this case, to prove facts they did not allege (proximate cause there; an

---

[4] See, *e.g.*, *Wilson* v. *Rousseau*, 45 U.S. 646, 690 (1846) (McLean, J., dissenting) ("[t]he most natural and genuine way of construing a statute is to construe one part by another part of the same statute"); *id.* at 691 ("This view gives effect to the section, and harmonizes its provisions. The other construction makes the parts of the section repugnant, and nullifies the whole of it. Now, which is the more reasonable view?").

agreement here) that were not inconsistent with the insufficient facts they *did* allege.

3. Commentary by Judge Charles E. Clark and his contemporaries supports interpreting Rule 8 in accordance with its plain language. The thrust of Rule 8, in Judge Clark's view, was the avoidance of detail in pleadings—not the elimination of a requirement that the plaintiff "state a claim." Charles E. Clark, *Special Pleading in the "Big Case"*, 21 F.R.D. 45, 52 (1957).

According to "Judge Arthur T. Vanderbilt, Chief Justice of the New Jersey Supreme Court, ex-president of the American Bar Association, well known advocate of the new Federal Rules and of sensible pleading, writer of the forward to Barron and Holtzoff's Federal practice":

> "The flexibility and seeming informality of pleadings under the new rules should not deceive one into believing that the essentials of sound pleading at law or in equity have been abandoned. Quite the contrary; the objective of reaching an issue of law or of fact in two or at the most three simple pleadings has been attained but *not at the sacrifice of stating the elements of a claim or defense* * * *. The grand objective of the movement for simplified procedure by rules of court is the elimination of the interminable prolixity and absurd technicalities of special pleading—not by abandoning stating the essentials of a cause of action or of a defense, but by doing so in 'simple, concise and direct' terms."

Statement of Judge Hall, in *Claim or Cause of Action*, 13 F.R.D. 253, 264-265 (1952) (quoting a letter from Judge Vanderbilt) (emphasis added).

"A claim for which relief can be granted is a claim which is cognizable in law. Anything less is not cognizable in law * * *." Statement of Judge Mathes, *id.* at 265. Another commentator decried interpretations of Rule 8(a)(2) that emphasized liberal pleading at the expense of the plain language

of the rule. "Those words 'showing that the pleader is entitled to relief' seem to have been read out of the Rule * * *." Statement of Moses Laskey, *id.* at 268-269.

B. The Court Should Clarify That Rule 8(a)(2), Combined With the Rule 8(f) Instruction To Construe Pleadings To Do "Substantial Justice," Permits Courts Leeway When Considering Complaints in Extreme Cases

Reversal also is warranted because the complaint does not provide petitioners notice of what about their conduct respondents are complaining. This Court repeatedly has stated the importance of testing complaints carefully. Rule 8(f) specifically *requires* construction of complaints so as to do "substantial justice." A pleading standard that sends parties to multi-million dollar discovery despite a plaintiff's failure to allege facts meeting the elements of a cause of action plainly violates that requirement.

1. Even the most ardent advocates of liberal pleading practice emphasize the necessity that the complaint put a defendant on notice of the claims against it. See, *e.g.*, Charles E. Clark, *Pleading Under the Federal Rules*, 12 Wyo. L.J. 177, 181 (1958).[5] This Court repeatedly has emphasized that requirement. See, *e.g.*, *Dura*, 544 U.S. at 346. The requirement that a defendant have sufficient information to prepare its defense is what precludes a plaintiff's resorting to alleging legal conclusions, rather than facts supporting their claims. See Christopher M. Fairman, *The Myth of Notice Pleading*, 45 Ariz. L. Rev. 987, 999 (2003) ("Broad statements of legal conclusion

---

[5] Although Judge Clark was the architect of the Federal Rules and regularly is cited as the principal proponent of the notice pleading standard, he and other commentators on Rule 8 have denounced a standard that depends on nothing more than "notice." See Clark, 12 Wyo. L.J., *supra*, at 181 (Rule 8 does not prescribe mere notice pleading); 5 Wright & Miller, Fed. Prac. & Proc., *supra*, § 1202, at 92 (notice pleading is an "unfortunate" label).

do not meet the pleading requirements under the Federal Rules * * *. The reason is simple. Legal conclusions do not comport with a notice standard."). Cf. Clark, 21 F.R.D., *supra*, at 52 (noting the "settled view that the pleader shows the facts and the court applies the legal conclusion").

The complaint in this case offers nothing more than bare allegations—contained in two separate paragraphs—that "upon information and belief," "Defendants entered into a contract, combination or conspiracy to prevent competitive entry in their respective * * * markets." JA 11, 27. Courts uniformly hold that such a bare bones allegation is insufficient to survive a motion to dismiss. See, *e.g.*, *Tal* v. *Hogan*, 453 F.3d 1244, 1261 (10th Cir. 2006); *DM Research, Inc.* v. *College of American Pathologists*, 170 F.3d 53, 56 (1999) (Boudin, J.); *Sutliff, Inc.* v. *Donavan Cos.*, 727 F.2d 648, 654 (7th Cir. 1984) (Posner, J.); *Heart Disease Research Found* v. *General Motors Corp.*, 463 F.2d 98, 100 (2d Cir. 1972). See also Fairman, 45 Ariz. L. Rev., *supra*, at 1036 (noting a judicial "consensus" under which "[c]onclusory allegations [of conspiracy] are consistently rejected"); Richard L. Marcus, 86 Colum L. Rev., *supra*, at 435 (noting "a number of areas in which courts refuse to accept 'conclusory' allegations as sufficient under the Federal Rules").[6] Without more, that allegation is nothing more than an allegation that "the defendant torted me"—it tells petitioners nothing about what conduct they supposedly undertook that makes out the alleged conspiracy. As Judge Lynch recognized, a conclusory conspiracy allegation does not give the necessary notice "of how and why the defendants are alleged to have conspired."

---

[6] As the First Circuit noted in just this context in *DM Research, Inc.*, 170 F.3d at 55, "[c]onclusory allegations in a complaint, if they stand alone, are a danger sign that the plaintiff is engaged in a fishing expedition." This litigation paints a particularly compelling picture why that concern exists. Respondents seek not just to engage in a fishing expedition, but to require petitioners to fund a deep-sea charter on a multi-million-dollar yacht.

Pet. App. 45a. Respondents apparently do not challenge that reality here. See Opp. 25.

The notice requirement also is a fundamental distinction between this Court's opinions in *Swierkiewicz* and *Conley* and this case. Judge Lynch recognized "the factual basis of a Title VII claim is fairly self-evident—respondent suffered an adverse job action and alleges that it was the result of discrimination." Pet. App. 45a. So, too, with the allegations required to state a claim for negligence resulting in a car crash injuring the plaintiff, detailed in Form 9 to the Federal Rules. And the case that might be thought the "poster child" for the modern pleading standard, *Dioguardi* v. *Durning*, 139 F.2d 774 (2d Cir. 1944) (Clark, J.), approved coarsely-drawn allegations that the defendant improperly disposed of items belonging to the respondent, causing respondent harm. *Id.* at 774-775. Essential to all of these cases is that, however simple the allegations involved, a defendant can understand exactly of what the plaintiff is complaining. By contrast, the conclusory allegation that "defendants conspired" does not tell petitioners in what conduct they are supposed to have engaged.

2. The notice concerns underlying Rule 8(a)(2) take on special significance in the context of litigation, like this case, in which denying a motion to dismiss gives "an *in terrorem* increment of the settlement value." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 741 (1975). In *Associated General Contractors*, like this case a complex private antitrust suit, the Court noted that "in a case of this magnitude, a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." 459 U.S. at 528 n.17.[7]

---

[7] Implicit in these holdings is the understanding that modern complex litigation does not fit neatly into the paradigm of litigation envisioned by the drafters of the federal rules in 1938. See Richard A. Epstein, *Motions to Dismiss in Antitrust Cases: Separating Fact from Fantasy*, AEI-

This case raises the specter of just the *in terrorem* settlements for which this Court has expressed concern. As the Seventh Circuit noted when affirming a dismissal of a § 1 complaint, "the costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint." *Car Carriers, Inc.* v. *Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984) (Easterbrook, J.) (citing cases including *Associated General Contractors*, 459 U.S. at 528 n.17, and *Sutliff*, 727 F.2d at 654).

The expense and potential for abuse of discovery in massive litigation—including, but not limited to, antitrust litigation—has been much remarked by this Court, judges, and commentators. According to Judge Easterbrook, "[a]n impositional * * * discovery request is one 'justified' from the demander's perspective not by its contribution to an anticipated judgment but by its contribution to an anticipated settlement." Frank Easterbrook, *Discovery as Abuse*, 69 B.U. L. Rev. 635, 637 (1989). And "[i]mpositional discovery requests depend on asymmetric costs. If E's demands injure F more than F's demands can injure E, then E has every reason to pepper its adversary with requests." *Id.* at 643. See also William H. Wagener, Note, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. Rev. 1887, 1902-1903 (2003) (noting the effect of asymmetry between the parties' litigation costs).

Outside of the Rule 12 procedures for disposing of claims early, the U.S. system lacks a means to control the problem of impositional discovery. "Because litigants do not bear the costs created by their discovery requests, their incentive to confine those requests in a procedurally efficient manner is significantly distorted." Martin H. Redish, *Electronic Discovery and the*

Brookings Joint Center for Regulatory Studies Related Pub. 06-08, at 3 (March 2006).

Litigation Matrix, 51 Duke L.J. 561, 569 (2001). Judge Easterbrook further has argued that for a host of reasons, control of discovery by judges is a marginally effective protection against these abuses. Easterbrook, 69 B.U. L. Rev., *supra*, at 638-639.

The result is that "fee shifting, ever-spiraling discovery costs, and weak judicial safeguards against discovery abuse, result in a structure whereby an opportunistic plaintiff alleging a frivolous antitrust claim can extract a sizable settlement that exceeds the expected value of the plaintiff's award at verdict." Wagener, 78 N.Y.U. L. Rev., *supra*, at 1888. This is all the more so in the modern era of electronic, computer-based discovery, which "may involve extraordinary costs that are clearly outside the usual cost of doing business." Kenneth J. Withers, *Computer-Based Discovery in Federal Civil Litigation*, 2000 Fed. Cts. L. Rev. 2, 13, *available at* http://www.fclr.org/articles/2000fedctslrev2.pdf; see also Georgene Vairo, *Developments in the Law: Electronic Discovery*, 38 Loyola L.A. L. Rev. 1529, 1530 (2005) (noting that "the volume of electronically-stored material presents huge problems for large corporations").[8] "The same rules of discovery that generate one or two days worth of litigation in simple contract disputes" can take "years if not decades" in the case of massive class action

---

[8] To be sure, the Federal Rules give courts power to "condition discovery in some cases upon the bearing of costs." Withers, 2000 Fed. Cts. L. Rev., *supra*, at 13. See, *e.g.*, *Anti-Monopoly, Inc.* v. *Hasbro, Inc.*, 1996 WL 22976, at *2 (S.D.N.Y. Jan. 23, 1996) (requiring the plaintiff to pay defendants' costs in creating a computer program to search defendants' electronic files). But apart from a judge's discretion, no special rules exist to protect defendants in the new context of electronic discovery. "Courts have held, as they do in traditional discovery, that inconvenience and expense are not valid reasons for the denial of electronic discovery." Redish, 51 Duke L.J., *supra*, at 575. A defendant's "blackmail settlement" (Henry Friendly, Federal Jurisdiction: A General View 120 (1973)) calculus often will be made before it is clear whether judicial intervention will protect them from unduly burdensome discovery costs.

against national companies like petitioners. Epstein, Related Pub. 06-08, *supra*, at 6. See also Paul J. Stancil, *Atomism and the Private Merger Challenge*, 78 Temple L. Rev. 949, 996-999 (2005) (describing the "staggering[]" expense of defending against private antitrust suits and the disparity in costs incurred by defendants *vis-à-vis* plaintiffs). In the almost unimaginably large class action before the Court—purporting to involve as plaintiffs hundreds of millions of consumers, against the companies that together provide the vast majority of local telephone and Internet services in the United States—all of those concerns are elevated to a fever pitch.

3. "A more responsible approach, which seeks *both* to give notice and weed out groundless claims, also requires the procedural system to make some critical assessment of the costs and benefits of stopping litigation at the pleading stage relative to those of going forward with discovery." Epstein, Related Pub. 06-08, *supra*, at 12. The federal rules explicitly provide a mechanism for considering the realities of massive, complex, and blackmail litigation in considering motions to dismiss complaints. Rule 8(f) instructs that "[a]ll pleadings *shall* be so construed as to do substantial justice." (Emphasis added.) Although this Court has applied Rule 8(f) in the context of resuscitating a complaint to protect a plaintiff's cause of action (see, *e.g.*, *Swierkiewicz*, 534 U.S. at 513-514), by its plain language the rule applies equally to permit dismissal of complaints that serve the ends of coerced settlement rather than merits determinations.

Amici do not argue that complex cases or antitrust cases should be subject to a "heightened" pleading standard. See Rule 9(b). This Court's opinion in *Leatherman* explicitly foreclosed any such approach. See 507 U.S. at 168. The rule from *Blue Chip Stamps*, *Associated General Contractors*, and *Dura*—which finds support in the text of Rule 8(f)—is that pleadings under Rule 8(a)(2) must be construed in light of the

realities of modern complex litigation.[9]

II. For an Entitlement to Relief to Be Warranted by Sherman Act Section 1, the Facts Pleaded Must "Tend to Exclude the Possibility" of Independent Conduct

Amici argue above that the Rule 8(a)(2) standard requires allegations meeting the elements of whatever a plaintiff's substantive claim. That requirement permits courts to dismiss complaints based on legal theories that are deficient or incorrect—a process this Court expressly and repeatedly has approved. See, *e.g.*, *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *NYNEX Corp.* v. *Discon, Inc.*, 525 U.S. 128 (1998).

A. Antitrust Law and Scholarship Long Have Comprehended that Parallel Conduct Does Not Support an Inference of Concerted Activity

1. There appears to be no dispute in this litigation that conscious parallel conduct by competitors does not suffice to state a claim under § 1. See *Theatre Enters.*, 346 U.S. at 541. "[C]onscious parallelism is never meaningful by itself * * *." It "is a neutral fact in the absence of evidence which would lead one to expect that [conduct] would have been different if truly independent decisions had been made." Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 658, 659 (1962).

The rationale underlying *Theatre Enterprises* is simple and

---

[9] Similarly, Federal Rule of Civil Procedure 1 states that the rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." In 1993 the rule was amended to add the phrase "and administered." The amendment recognizes "the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay." Fed. R. Civ. P. 1, Adv. Comm. Notes.

irrefutable. No matter what the level of competitiveness in an industry, firms acting in economically rational fashion can be expected to behave in a parallel manner. As *amici* economists argued in support of the petition for certiorari in this case, in a "perfectly competitive market, all firms charge the same price at all times." Economists' Br. 7; see *id.* at 8 (noting this phenomenon is not limited to prices, but includes "product design, entry, location, marketing, and other business decisions"). This phenomenon occurs because the firms are reacting in the same manner to the same impulses. *Id.* at 7.

But nor does parallel conduct necessarily imply the hypothetical "perfect competition." Parallel conduct will occur in an industry characterized by few competitors for the same or different reasons. Sufficiently substantial impulses—for example, significant regulatory developments or technological innovations—will cause all firms in an industry with few firms to react in identical fashion, just as if the industry was characterized by perfect competition. Firms may act in identical fashion because they look two moves ahead and are aware of the impact on the industry of their taking certain actions. See *Brooke Group*, 509 U.S. at 227 (it is not illegal for firms to "recogniz[e] their shared economic interests and their interdependence with respect to price and output decisions"). Those same firms may also act in identical fashion because they imitate successful strategies their competitors employ. See Economists' Br. 8-9; see also *id.* nn. 4-5 (citing economic scholarly commentary).

This analysis serves to demonstrate what this Court repeatedly has recognized: that parallel behavior among firms in an industry tells us nothing about whether those firms are colluding. See *Theatre Enters.*, 346 U.S. at 541; *Brooke Group*, 509 U.S. at 227 (conscious parallel conduct is explainable by means other than a conspiracy); *Matsushita*, 475 U.S. at 589-593 (noting the inherent implausibility of the conspiracy the plaintiffs alleged); *Monsanto*, 465 U.S. at 762-764 (noting the existence of legitimate justifications for the complained-of

conduct). See also 2 Joseph P. Bauer & William H. Page, Kintner's Federal Antitrust Law § 11.5, at 62-63 (2d ed. 2002) (interpreting *Monsanto* and *Matsushita* to require facts inconsistent with unilateral conduct). In fact, commentators have noted that parallel conduct by competitors is most likely the result of legitimate, unilateral business decisions. See Epstein, Related Pub., *supra*, at 3; Economists Br. 9. Both courts below recognized this fact. Pet. App. 24a; Pet. App. 41a.

2. More, it is dangerous for courts to indulge the inference of a conspiracy in violation of the antitrust laws from facts that lead equally, or primarily, to a conclusion of legitimate unilateral behavior by competitors. Such an unfounded inference presents two extraordinary harms. First, a legal rule that permits the drawing of inferences of conspiracy from parallel behavior "would impose direct costs on business firms as management has to fight the major distractions of litigation, and it imposes dead-weight costs on the economy, by soaking up resources in rent-seeking litigation." Epstein, Related Pub. 06-08, *supra*, at 3. Second, the drawing of such unfounded inferences threatens firms with drastic consequences for engaging in economically rational, pro-competitive unilateral conduct. "[E]ntry, pricing, marketing and other business decisions would be colored by a dismissal rule that opens all American businesses to unsubstantiated allegations of conspiracy to restrain trade." *Ibid.* These concerns are relevant to a court's construction of a plaintiff's claims. See *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 124 (3d Cir. 1999) ("The acceptable inferences which we can draw from circumstantial evidence vary with the plausibility of the plaintiff's theory and *the danger associated with such inferences.*") (emphasis added). Cf. p. 18, *supra* (arguing for a construction of complaints informed by Rule 8(f)).

A rational reaction of firms to increased danger of litigation over legitimate unilateral conduct would be deliberately to undertake an *inefficient* course of conduct to avoid acting in parallel with competitors. For example, *amici* economists

observed how innovations are diffused through industries by imitative behavior by firms. Economists' Br. 8. Enter the threat of litigation because one firm has copied a successful strategy of its competitor—likely a unilateral business decision, but not *inconsistent* with acting in concert with the competitor. *Id.* at 9. The would-be imitator is now strongly encouraged, if not compelled, to delay or avoid implementing the particular innovation to avoid the threat of litigation. Given the massive expense of litigating a suit like the class action in this case, the expected return from the innovation itself would have to be massive for a competitor to risk implementing it.

The same limits on efficient behavior by businesses could give rise to higher prices and reduced output—the precise evils that at the most elemental level the antitrust laws exist to prevent. If one competitor lowers prices in an effort to increase market share, a price match by another will be parallel conduct that is not necessarily inconsistent with collusion. Cf. *Matsushita*, 475 U.S. at 594 (rejecting theory under which defendants were supposed to have conspired to maintain artificially low prices). A result might be that the first-mover gains a monopoly (and the corollary pricing power) while its competitor, stifled by a litigation threat, cannot react. The same occurs if, in response to an external stimulus, one competitor raises prices. Its competitor, fearful of reacting in kind, either monopolizes the market or fails because its prices are too low, in which case the first mover gains a monopoly.

These examples demonstrate the economic reality that restraints on rational business conduct harm consumers. According to Judge Bork, "adjustment to shifting costs and demand is socially desirable, and it is best that appropriate responses be made as quickly as possible." Robert H. Bork, The Antitrust Paradox 388 (1978). A rule that penalizes firms for undertaking the rational response to external stimuli—whether those stimuli are the actions of competitors or are external to the market—risks increasing price rigidity and stifling other business decisions. This Court more than once has "emphasized

that courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct." *Matsushita*, 475 U.S. at 593 (citing *Monsanto*, 465 U.S. at 762-764). Rules are discouraged that "'end up by discouraging legitimate price competition.'" *Id.* at 594 (quoting *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983) (Breyer, J.)).

B. To Support an Inference of a Conspiracy, Allegations of Fact Must "Tend to Exclude the Possibility" of Legitimate Unilateral Conduct

1. In *Monsanto*, the Court refused to permit "an agreement to be inferred from" conduct that occurs "in the normal course of business and do[es] not indicate illegal concerted action." 465 U.S. at 763 (internal quotations omitted). Instead, "there must be evidence that tends to exclude the possibility that the [defendants] were acting independently." *Id.* at 764. The Court reiterated in *Matsushita* that "a plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." 475 U.S. at 588 (quoting *Monsanto*).

Contrary to the panel's understanding (Pet. App. 25a; see also Opp. 14), the rules from *Monsanto* and *Matsushita* are not somehow confined to the summary judgment procedure. *Amici* have argued proof should not be permitted as to elements of a claim that have not been pleaded. See pp. 9-10, *supra*. Thus, respondents' failure to plead an agreement under the *Monsanto/Matsushita* standard (a failure even the panel appeared to recognize, see Pet. App. 23a-25a) should preclude respondents from introducing evidence on that element. But without it, respondents cannot survive summary judgment. The panel's approach would require the parties to proceed to discovery toward an end at summary judgment that has already been decided.[10]

---

[10] For this reason, as well as the extraordinary cost of discovery in a

Allegations of facts that are ambiguous as to whether conduct is innocent or not do not meet the standard. "In some cases the parallel conduct is at least equally consistent with an independent motive that each firm would pursue regardless of what the other firms did. In such cases * * *, there is not agreement or concerted action * * *." Einer Elhauge & Damien Geradin, Global Antitrust Law & Econ. ch. 6, at 22 (forthcoming Foundation Press). "[P]roof of an agreement requires some evidence that is *exclusively* of agreement." 2 Bauer & Page, Kintner's Federal Antitrust Law, *supra*, § 11.4, at 59.[11]

Allegations of interdependent conduct that does not involve agreement likewise do not meet the *Monsanto/Matsushita* standard. It is permissible for competitors in markets characterized by few competitors to make decisions "that take

---

case of this magnitude (see pp. 15-17, *supra*), a suggestion that it might be appropriate to test respondents' allegations at the summary judgment stage is shortsighted. See Epstein, Related Pub. 06-08, *supra*, at 12-13 (noting regarding the *Twombly* litigation that "*all* of the plaintiff class's factual allegations are true (if vacuous). It therefore seems quite possible that the situation after exhaustive discovery will remain exactly where it is today. After all, if these statements are sufficient to support the inference of conspiracy, what kind of denials are so strong to lead to the conclusion that the case presents no genuine issue of fact[?]"). See also Cert.-stage Brief of MasterCard International Inc. and Visa U.S.A. Inc. As *Amici Curiae* in Support of Petitioners 6 n.6 (filed Apr. 6, 2006) (arguing that summary judgment is not an effective filter).

[11] Professors Bauer and Page demonstrate this concept graphically with a Venn diagram comprised of overlapping circles. If the leftmost circle represents evidence that indicates agreement, and the rightmost circle represents evidence that indicates independent action, the overlap represents evidence that is ambiguous as to whether it indicates agreement or independent action. "[E]vidence solely in [the overlap] is insufficient." 2 Bauer & Page, Kintner's Federal Antitrust Law, *supra*, § 11.5, at 59-60.

into account price interdependence * * *. [S]uch oligopolistic coordination does not involve an agreement or concerted action." Elhauge & Geradin, Global Antitrust, *supra*, ch. 6, at 22.

Lower courts have stated the required showing for circumstantial evidence of conspiracy to be one of "parallel conduct plus"—with the "plus" representing allegations that make it unlikely the parallel conduct is based on a firm's pursuit of its unilateral best interest. See, *e.g.*, *Mitchael* v. *Intracorp, Inc.*, 179 F.3d 847, 858-859 (10th Cir. 1999). "A plus factor is any form of evidence that tends to exclude the possibility that individuals work independently." Epstein, Related Pub. 06-08, at 10-11 (citing *Apex Oil Co.* v. *DiMauro*, 822 F.2d 246 (2d Cir. 1987)).

Amici recommend this Court not simply adopt the doctrine of "plus factors" from the courts of appeals. Plus factors are a vague amalgam of matters, all of which are relevant in the Evidence Rule 401 sense to the question of conspiracy, but which often fail to rise to the level of "tending to exclude the possibility" of unilateral conduct. Indeed, as respondents argue in this case (Opp. 25-26), they did state allegations of facts that courts have considered to be "plus factors." See JA 23 (trade association involvement); JA 26 (market structure is conducive to agreement). Cf. *Apex Oil Co.*, 822 F.2d at 253-254 (discussing plus factors including "a common motive to conspire or a high level of interfirm communications"). But the court noted in *Apex Oil Co.*:

> However, such plus factors may not necessarily lead to an inference of conspiracy. For example, such factors in a particular case could lead to an equally plausible inference of mere interdependent behavior, *i.e.*, actions taken by market actors who are aware of and anticipate similar actions taken by competitors, but which fall short of a tacit agreement * * *. In such a case, a court might find it difficult to hold that the parallel acts "tend to exclude the possibility" of independent action.

822 F.2d at 254 (citing Phillip E. Areeda, Antitrust Analysis 374-375 (3d ed. 1981)). See 2 Bauer & Page, Kintner's Federal Antitrust Law, *supra*, § 11.6, at 72 ("The mere opportunity to conspire, however, does not prove that a conspiracy took place.").

2. Effectively to plead a circumstantial case of conspiracy in violation of § 1, a plaintiff must plead facts that, if true, give rise to a reasonable inference that the parallel conduct was the product of a conspiracy. This rule is an application of the plus-factors framework that solves the question how to deal with allegations of ambiguous facts. Modern analysis of plus factors appears to be centering on this rule. See, *e.g.*, *In re Flat Glass Antitrust Litig*, 385 F.3d 350, 360-361 (3d Cir. 2004). Cf. 2 Bauer & Page, Kintner's Federal Antitrust Law, *supra*, § 11.5, at 64 ("[t]he decision to classify ambiguous evidence as a plus factor or merely as consistent with both collusion and independent action is often critical").

Sufficient allegations "could, for example, be in ordinary price fixing cases evidence that representatives of the defendants all converged on some out-of-the-way location for a secret meeting." Epstein, Related Pub. 06-08, *supra*, at 11. Allegations of conduct that would be truly irrational in the absence of concerted action also tend to exclude the possibility of unilateral conduct (but the allegations in this case, refuted as they are by known facts about the industry, do not meet the standard). Economic analysis, while it is not necessary to create a reasonable inference sufficient to survive a motion to dismiss, can be relevant at the motion to dismiss stage when economic principles are imbedded in the particular substantive rule of law. Cf. 2 Bauer & Page, Kintner's Federal Antitrust Law, *supra*, § 11.6, at 71 (plaintiffs might use "statistical techniques, like multiple regression analysis * * *, to isolate possible explanations for parallel conduct" so long as it "account[s] for all significant variables"). Whatever allegations a § 1 plaintiff makes, the facts alleged *must* give rise to a reasonable inference of unlawful conduct. Otherwise, legitimate, highly desirable

business decisions by competitors will be bases for requiring them to submit to massive fact-finding expeditions that often will coerce settlement, even if there is no risk they will give rise to liability.

The complaint in this case contains assorted allegations of plus factors that do not rise to the level of tending to exclude the possibility of unilateral business decisions. Allegations of opportunities to communicate with one another (JA 23) might support an inference that it is possible for petitioners to collude, but it is equally a feature of petitioners' industry in which all participants are required to interconnect with one another.[12] Allegations of an oligopolistic market structure and contiguous territories (JA 21, 26), while they might make collusion possible, do nothing to make unilateral conduct improbable. Neither allegation tends to exclude the possibility of legitimate unilateral conduct. Both merely go to "opportunity to conspire." See 2 Bauer & Page, Kintner's Federal Antitrust Law, *supra*, § 11.6, at 72. The district court correctly concluded that those allegations are not sufficient to defeat the motion to dismiss.

Allegations that petitioners have unilateral incentives to enter one another's markets (JA 21), once again, might lend themselves to collusive conduct. Unlike the allegations discussed in the prior paragraph, this allegation might be sufficient in other circumstances to permit an inference of a conspiracy. Any such inference is defeated in this case, however. As the district court recognized, publicly available information and respondents' own allegations demonstrate the allegation is incorrect. "[T]here are all sorts of reasons [for ILECs] not to enter a new territory." Epstein, Related Pub., *supra*, at 16; see also *id.* at 17-18 (detailing reasons). The district court noted that the advantages an ILEC enjoys when

---

[12] Indeed, the duty to interconnect in part underlay the allegations in *Trinko*, 540 U.S. 398, which this Court held were insufficient to state a claim of a violation of 15 U.S.C. § 2.

competing with its own infrastructure evaporate when the ILEC competes as a middleman, using another's infrastructure. Pet. App. 52a-53a. Respondents themselves allege a statement by a CEO of one ILEC (JA 22), taken from a quote in which he said that competing as a CLEC was not a sound long-term strategy. Pet. App. 56a. Finally, respondents allege other facts that further explain ILECs' decisions not to enter others' territories as CLECs. According to respondents, entry as a CLEC is extremely difficult because ILECs are taking steps to protect their own territories. JA 23-26. See also *Trinko*, 540 U.S. at 408 (holding allegations of exclusionary conduct by ILECs insufficient to state a claim under § 2).

The complaint contains one allegation of fact apparently directed toward possible direct proof of a conspiracy among petitioners. That allegation is of a public statement by an executive of one petitioner that entering into a competitor's territory "might be a good way to turn a quick dollar but that doesn't make it right." JA 22. Initially, it is not clear the quoted language—even standing alone—gives rise to an inference of a conspiracy rather than unilateral action. Even if it could, Judge Lynch correctly recognized the allegation, which relied on publicly available material, could not be taken at face value when the entire quote was available. Pet. App. 56a. The entire quote made clear that the executive "did not consider becoming a CLEC to be a sound long-term business plan" (Pet. App. 56a)—thus, the executive was expressing unwillingness to pursue a short-term but unsustainable profit at the expense of the long term. The entire statement serves better to explain petitioners' parallel conduct as being in their unilateral best interest—not in any way supporting an inference of a conspiracy.[13]

* * * * *

---

[13] Respondents' other allegations of statements by the Illinois Coalition for Competitive Telecom and two U.S. Representatives (JA 44-45) do nothing to exclude the possibility of legitimate unilateral conduct.

Conscious parallel conduct by competing firms does not violate § 1. The pleading standard followed by the panel below nonetheless permits the imposition of severe *de facto* sanctions—perhaps tens of millions of dollars in discovery expenses (a figure that might well approach or exceed the $100 million maximum criminal sanction that would be available against any one defendant for a violation of § 1)—based on a complaint that alleges no facts making it at all probable the parallel conduct is the product of a conspiracy. No understanding of the pleading standards under Rule 8, or the motion to dismiss construct under Rule 12, permits—let alone requires—that result.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

PAUL J. STANCIL
504 E. Pennsylvania Ave.
Champaign, Illinois 61820
(217) 333-0931

MAX HUFFMAN*
Clifton Ave. and Calhoun St.
Room 2M20
Cincinnati, Ohio 45221
(513) 556-0116

**Counsel of Record*

(25) File Date: 8/25/06

No. 05-1126

In the Supreme Court of the United States

BELL ATLANTIC CORPORATION, ET AL.,
Petitioners

v.

WILLIAM TWOMBLY, ET AL.,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF MASTERCARD INTERNATIONAL INC. AND VISA U.S.A. INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

TIMOTHY J. MURIS
(Counsel of Record)
REBECCA H. FARRINGTON
TOBY HEYTENS
ADAM J. COATES
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

REASONS FOR GRANTING THE WRIT 2

I. Meaningful implementation of the Rule 8(a) pleading standard is especially important in antitrust cases 3

II. Lower courts and plaintiffs' lawyers have already seized on *Twombly* to justify loosening existing pleading standards in a wide variety of contexts 8

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

In re Alstom SA Securities Litigation,
406 F. Supp. 2d 433 (S.D.N.Y. 2005) 9

Arnold-Chevrolet LLC v. Tribune Co.,
No. 04-CV-3097 (DRH) (WDW),
2006 WL 497202 (E.D.N.Y. Mar. 2, 2006) 8

Balaklaw v. Lovell,
14 F.3d 793 (2d Cir. 1994) 9

Daniel v. American Board of Emergency Medicine,
428 F.3d 408 (2d Cir. 2005) 10

FTC v. Lukens Steel Co.,
444 F. Supp. 803 (D.D.C. 1977) 4

In re Global Crossing, Ltd. Securities Litigation,
No. 02 Civ. 910 (GEL),
2005 WL 2990646 (S.D.N.Y. Nov. 7, 2005) 9

In re Hydrogen Peroxide Antitrust Litigation,
401 F. Supp. 2d 451 (E.D. Pa. 2005) 8

Kendall v. Visa U.S.A., Inc.,
No. C 04-04276JSW, 2005 WL 2216941
(N.D. Cal. July 25, 2005) 2

Lee v. Healthfirst, Inc.,
No. 04 Civ. 8787 (THK),
2006 WL 177175 (S.D.N.Y. Jan. 25, 2006) 9

Matsushita Electric Industrial Co. v. Zenith Radio Corp.,
475 U.S. 574 (1986) 6

Michael Aram, Inc. v. Laurey,
No. 05 Civ. 8380 (CSH),
2006 WL 510527 (S.D.N.Y. Mar. 1, 2006) 9

Monsanto Co. v. Spray-Rite Service Corp.,
465 U.S. 752 (1984) 6

National Bancard Corp. v. VISA U.S.A., Inc.,
779 F.2d 592 (11th Cir. 1986) 1

Nokia Corp. v. Uzan,
425 F.3d 1005 (2d Cir. 2005) 10

Reyn's Pasta Bella, LLC v. Visa U.S.A., Inc.,
259 F. Supp. 2d 992 (N.D. Cal. 2003) 1-2

Texaco, Inc. v. Dagher,
126 S. Ct. 1276, (2006) 1

United States v. Broadcast Music, Inc.,
426 F.3d 91 (2d Cir. 2005) 10

United States v. Valdez,
426 F.3d 178 (2d Cir. 2005) 10

United States v. Martin,
426 F.3d 83 (2d Cir. 2005) 10

United States v. Santos,
425 F.3d 86 (2d Cir. 2005) 10

In re Urethane Antitrust Litigation,
409 F. Supp. 2d 1275 (D. Kan. 2006) 8

Waterman v. Register.com,
No. 05 CIV 2191 (GEL),
2005 WL 2759825 (S.D.N.Y. Oct. 19, 2005) 9

Zmijewska v. Gonzales,
426 F.3d 99 (2d Cir. 2005) 10

OTHER AUTHORITIES

Edward D. Cavanagh, *Pleading Rules in Antitrust Cases: A Return to Fact Pleading?*, 21 Rev. Litig. 1 (2002) 7

Edward D. Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 Tul. L. Rev. 777 (1987) 6

Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. Rev. 635 (1989) 5

In re Polygram Holding, Inc., No. 9298, 5 Trade Reg. Rep. (CCH) ¶ 15,453 (F.T.C. July 24, 2003) 1

Report from the Advisory Committee on Federal Rules of Civil Procedure to the Standing Committee on Rules of Practice and Procedure (Dec. 15, 2005) 4

James L. Smith, *Distinguishable Patterns of Competition, Collusion, and Parallel Action* (May 5, 2003) 3

William H. Wagener, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. Rev. 1887 (2003) 5

INTEREST OF *AMICI CURIAE*[1]

MasterCard International Inc. ("MasterCard") and Visa U.S.A. Inc. ("Visa") are joint ventures established and operated by various financial institutions to develop and promote globally recognized payment cards. Neither MasterCard nor Visa actually issues payment cards to consumers: various member banks issue cards. Instead, MasterCard and Visa provide certain services that would be difficult for their individual members to perform on their own, including: (1) the promotion and marketing of a universally recognized mark; and (2) a system to facilitate the approval and processing of charges involving millions of merchants and card-holders and thousands of banks every day. The result has been expanded output, declining prices, and technological innovation—all indicators of significant and increasing competition.

In MasterCard's and Visa's view, "[n]o analytical exercise is more important to U.S. competition policy than defining the bounds of acceptable cooperation between direct rivals." *In re Polygram Holding, Inc.*, No. 9298, 5 Trade Reg. Rep. (CCH) ¶ 15,453 (F.T.C. July 24, 2003) (Opinion of Chairman Timothy J. Muris). Because they are joint ventures of banks across the country, MasterCard and Visa are sometimes subjected to allegations of conspiracy based simply on their structure. Of course, the formation of *bona fide* joint ventures among competitors is entirely lawful. *See, e.g., Texaco, Inc. v. Dagher*, 126 S. Ct. 1276, 1279-80 (2006). But that has not stopped plaintiffs' lawyers from alleging that the payment card industry's very nature is somehow suspect under the federal antitrust laws. *See, e.g., Nat'l Bancard Corp. v. Visa U.S.A. Inc.*, 779 F.2d 592, 596 (11th Cir.), *cert. denied*, 479 U.S. 923 (1986); *Reyn's Pasta Bella,*

---

[1] Letters of consent to the filing of this brief have been lodged with the Clerk. No counsel for a party authored this brief in whole or part, and no person or entity other than *amici* and their counsel made a monetary contribution to its preparation or submission.

LLC v. Visa U.S.A. Inc., 259 F. Supp. 2d 992, 1004 (N.D. Cal. 2003), *aff'd*, -- F.3d --, 2006 WL 760175 (9th Cir. Mar. 27, 2006); *Kendall v. Visa U.S.A. Inc.*, No. C 04-04276JSW, 2005 WL 2216941, at *1 (N.D. Cal. July 25, 2005).

In addition, as two of the four major "brands" of payment cards in the United States (the others are American Express and Discover), MasterCard and Visa have a special interest in ensuring that business entities are not subjected to burdensome litigation based on nothing more than a lawyer's ability to assert that vigorous competitors have at times acted in ways that can be characterized as "parallel." In fact, the history of the various payment card networks illustrates that parallelism is often a sound, pro-consumer business strategy.

Perhaps the most obvious example of parallelism involves the physical cards themselves. All payment cards are the same general size and shape, which makes it possible both for the cards to be carried in a purse or wallet along with a driver's license and other identification and allows the same machines to read the different networks' cards. Payment card companies have also engaged in parallelism involving technology. For example, payment card companies have made rational and independent—yet parallel—business decisions with regard to the feasibility of implementing particular technological innovations. Although each of these examples of parallelism was entirely lawful, it is precisely these sorts of sensible business decisions that will surely be subjected to increased scrutiny and litigation absent this Court's prompt intervention.

REASONS FOR GRANTING THE WRIT

Petitioners have cogently explained how the Second Circuit's decision conflicts with both the decisions of this Court and those of its sister Circuits, Pet. for Cert. 11-21, why it "invites frivolous litigation," *id.* at 26-29, and why prompt review by this Court is both necessary and appropriate, *id.* at

28-29. *Amici* will not repeat that analysis here. Instead, we will focus on two practical ramifications of the Second Circuit's decision, each of which independently warrants certiorari. *First*, ensuring that Rule 8(a)'s admittedly modest pleading requirements are not drained of all rigor is especially important for antitrust cases brought in the name of consumers, in which the nature of the disputes, the massive and asymmetrical discovery costs, and the threat of crippling remedies often combine to pressure defendants to settle cases that survive a motion to dismiss, even when the plaintiff's claims are marginal at best. Accordingly, it is critically important in such cases that the pleading stage afford antitrust defendants a meaningful opportunity to end a meritless suit before the risk calculus shifts and discovery commences. *Second*, as a mere six months' experience already shows, *Twombly* is a highly significant decision whose effects are already being felt far beyond the telecommunications industry or even antitrust cases.

I. Meaningful implementation of the Rule 8(a) pleading standard is especially important in antitrust cases.

As courts and commentators have long recognized, far from proving anticompetitive collusion, consciously parallel business conduct is often a hallmark of an efficient market.[2] Firms operating in the same industry confront similar cost and incentive structures, and it is hardly surprising that sophisticated businesses pay close attention to their rivals, both

---

[2] *See, e.g.*, James L. Smith, *Distinguishable Patterns of Competition, Collusion, and Parallel Action* 23 (May 5, 2003), *available at* http://web.mit.edu/ceepr/www/2003-006.pdf (last visited April 5, 2006) ("[T]he degree of parallel action among producers varies predictably with the degree of interdependence among firms . . . . [M]easures of parallel action are expected to vary inversely with the degree of interdependence: more parallelism among perfectly competitive firms, less among interdependent oligopolists, and even less among collusive members of a frictionless cartel.").

to ensure that they have not overlooked a revenue-increasing or cost-saving opportunity and to avoid being placed at a competitive disadvantage with respect to their mutual customers. Accordingly, legal rules that subject businesses to substantial costs simply because they have engaged in conduct that can be characterized as "parallel" risk deterring a great deal of pro-competitive behavior, generating net social losses that consumers will ultimately bear.

The pleading standard announced in *Twombly* is just such a rule. Because plaintiffs' lawyers will surely seize (and have already seized) upon it to argue that antitrust conspiracy claims can survive initial review based on factual allegations that demonstrate nothing more than parallel conduct, *Twombly* will harm competition for at least three important reasons.

The first relates to the nature of antitrust discovery. As this Court no doubt knows, civil discovery tends to be costly and time-consuming.[3] But this general reality is especially true for antitrust actions, where the inevitably fact-intensive and complex nature of the claims coalesce to make discovery particularly onerous, lengthy, and expensive.[4] As a result, antitrust cases tend to last substantially longer (and thus consume substantially more resources) than other types of civil litigation.[5] These basic realities give any rational business a

---

[3] *See, e.g.*, Report from the Advisory Comm. on Fed. R. Civ. P. to the Standing Comm. on R. of Prac. & P. 7-8 (Dec. 15, 2005), *available at* http://www.uscourts.gov/rules/Reports/CV12-2005.pdf (last visited April 5, 2006).

[4] *See, e.g.*, *FTC v. Lukens Steel Co.*, 444 F. Supp. 803, 805 (D.D.C. 1977) ("The discovery rules should normally be liberally construed . . . in antitrust cases.").

[5] Of the 599 antitrust cases of which the federal courts disposed in fiscal year 2000, the most recent year for which searchable data is readily available, the mean period from filing to final disposition was slightly more than 405 days. During the same year, the mean for all cases was approximately 312 days, about 23% or *three months shorter*. For cases

powerful incentive to avoid even factually meritless antitrust suits, even if that means forgoing certain competition-enhancing conduct in which the firm would otherwise engage.

Second, the fact that discovery costs in antitrust cases tend to be highly asymmetrical only exacerbates this general problem. Antitrust plaintiffs are generally much smaller than antitrust defendants, meaning that plaintiffs can demand both types and amounts of information that dwarf anything their adversaries could possibly seek in return. *See* Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. Rev. 635, 643 (1989) ("Large litigants have files—warehouses full of files. The adversary can demand that they be searched, at great cost; the adversary can notice the depositions of 20 corporate officers."); *see also* William H. Wagener, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. Rev. 1887, 1898 (2003) ("[T]he strategic plaintiff will evaluate her own exposure to costly discovery requests before drafting a broad discovery request."). In addition, because they have the power to choose when and on what precise theory to bring suit, antitrust plaintiffs can "structure [their] complaint to minimize the relevance of documents in [their] possession," which gives them a "tactical advantage in defining the parties' exposure to discovery costs." Wagener, *supra* at 1899. These general imbalances are even more pronounced when antitrust class actions are brought in the name of consumers, situations

---

terminated during fiscal year 1999, the comparable figures were slightly more than 497 and 406 days, respectively. (All data in this footnote was obtained from the searchable Federal District-Court Civil Cases database, available at http://teddy.law.cornell.edu:8090/questcv3.htm.) Significantly, this database does not distinguish between cases terminated at the pleading stage and those disposed of after discovery—for example, at the summary judgment stage. Therefore, it is likely that the lifespan of cases which survive past the pleading stage until summary judgment is significantly longer.

in which the plaintiffs' discovery costs will almost certainly be negligible, the defendants' will almost certainly be substantial, and the likelihood of bringing counterclaims is meager. The fact that antitrust discovery will almost always be far more expensive for defendants than plaintiffs, in turn, means that the former have far more powerful incentives to avoid it than the latter.

A final reason why permitting antitrust actions that are facially marginal to survive the pleading stage risks deterring pro-consumer conduct involves the prospect of what may happen if such a case ever reaches trial.[6] Because the upside of an antitrust plaintiff's victory is so huge—mandatory treble damages and fee-shifting—plaintiffs' attorneys have every incentive to press even marginal claims to the bitter end. *See, e.g.*, Edward D. Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 Tul. L. Rev. 777, 809 (1987) ("The lure of treble damages may encourage the filing of baseless suits which otherwise might not have been filed."). At the same time, because trials are so expensive and because even a small risk of potentially crippling liability is something that any sensible business will seek to

---

[6] *Twombly* does not purport to undermine the burden a Section 1 plaintiff must carry at the summary judgment stage. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (to survive summary judgment in the absence of direct evidence of conspiracy, a plaintiff must "present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently") (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)). That said, by threatening to extend the life of meritless cases, *Twombly* risks allowing many plaintiffs whose claims would otherwise be dismissed at the pleading stage a chance to survive the summary judgment hurdle as well, particularly given the fact that lower courts have sometimes allowed antitrust plaintiffs to reach trial based on little more than isolated, ambiguous, or confusing documents. Moreover, even when a defendant does prevail at the summary judgment stage, such a victory cannot restore the time and money wasted in defending against a strike suit. In short, although it is an important gatekeeper, summary judgment is no panacea for the problems created by *Twombly*.

avoid, it will often be rational for antitrust defendants to settle actions that they are confident would be proven meritless at a trial. *See, e.g.*, Edward D. Cavanagh, *Pleading Rules in Antitrust Cases: A Return to Fact Pleading?*, 21 Rev. Litig. 1, 11-13 (2002) ("Using straightforward cost-benefit analysis, many defendants faced with potentially huge outlays necessary to defend an action would choose to settle antitrust claims that they view as insubstantial and lacking in merit rather than to make the huge expenditures necessary to prevail at trial.").

The upshot of these facts and incentives is clear. Antitrust litigation is tremendously expensive, and it is generally far more so for defendants than for plaintiffs. Especially when combined with the widely asymmetrical risks the litigants will face if a case ever goes to trial, this basic reality encourages enterprising plaintiffs' attorneys to bring marginal claims without sufficient pre-filing factual investigation and makes it far easier for them to extract more and higher settlements from corporate defendants than the merits of their cases would otherwise warrant. A motion to dismiss for failure to state a claim should provide a defendant with a meaningful opportunity to end the proceeding before the risk calculus shifts and years of costly discovery commence. Accordingly, *Twombly*'s conclusion that Rule 8(a) erects only the thinnest of paper barriers against even facially frivolous claims threatens to induce firms to forgo efficient, procompetitive behavior to minimize the risk of such suits being filed in the first place, or to avoid the burdens of antitrust litigation by settling meritless claims for sums that will inevitably be paid by consumers.

II. Lower courts and plaintiffs' lawyers have already seized on *Twombly* to justify loosening existing pleading standards in a wide variety of contexts.

Although it is the context in which this particular case arose, the pernicious impacts of the Second Circuit's decision will not be confined to the telecommunications industry. Rather, courts in both the Second Circuit and elsewhere are already interpreting *Twombly* as an important general pronouncement about the Rule 8(a) pleading standard.

An examination of the subsequent cases that have referenced *Twombly* confirms its importance. Not surprisingly, *Twombly* has had an immediate and significant effect on district courts' understanding of the pleading standards for antitrust claims brought under Section 1 of the Sherman Act. In *Arnold Chevrolet LLC v. Tribune Co.*, a judge of the Eastern District of New York applied *Twombly*'s "realm of plausible possibilities" test to refuse to dismiss a complaint where "one possible *interpretation*" of the plaintiffs' allegations might lead to a finding of an unlawful conspiracy. No. 04-CV-3097 (DRH) (WDW), 2006 WL 497202, at *6 (E.D.N.Y. Mar. 2, 2006) (emphasis added). Courts outside the Second Circuit have also relied on *Twombly*'s description of the proper pleading standard to justify permitting antitrust conspiracy claims to survive motions to dismiss, and thus to compel defendants to submit to costly and time-consuming discovery. *See, e.g., In re Hydrogen Peroxide Antitrust Litig.*, 401 F. Supp. 2d 451, 460-61 (E.D. Pa. 2005); *In re Urethane Antitrust Litig.*, 409 F. Supp. 2d 1275, 1282, 1284 n.4 (D. Kan. 2006).

Nor has *Twombly*'s impact been limited to antitrust cases. For example, Judge Gerard E. Lynch, the district court judge whose careful opinion the Second Circuit reversed in *Twombly*, later applied the Second Circuit's formulation of the notice pleading standards to the securities fraud context in holding that the plaintiffs had adequately pled "control."

See In re Global Crossing, Ltd. Sec. Litig., No. 02 Civ. 910 (GEL), 2005 WL 2990646, at *8 (S.D.N.Y. Nov. 7, 2005). A different judge in the Southern District of New York later relied upon Judge Lynch's interpretation of the Second Circuit's *Twombly* decision to deny a motion to dismiss a securities fraud claim against two executives based on "control" allegations that were even more tenuous than those at issue in *Global Crossing*. *See In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 433, 503 (S.D.N.Y. 2005). In so holding, Judge Victor Marrero made clear that he would have dismissed the relevant claim pre-*Twombly* but that he had been persuaded that *Twombly* had altered the analysis. *See id.* District courts have also cited *Twombly* as justification for failing to dismiss actions for copyright infringement,[7] for employment discrimination,[8] and in other employment-related litigation.[9]

Plaintiffs' lawyers too have seized on *Twombly* to argue that their pleading burden is virtually nonexistent. Only weeks after the decision was handed down, plaintiffs in one antitrust case were arguing that *Twombly* "trumps" existing Second Circuit authority that had sensibly recognized that "'drawn-out proceedings necessary to evaluate [antitrust claims] could chill competitive forces.'"[10] According to that same filing, *Twombly* "expressly quoted and adopted" a "*special rule* for preserving antitrust cases for the discovery stage," and "explained that at the pleading stage even a po-

---

[7] *See Michael Aram, Inc. v. Laurey*, No. 05 Civ. 8380 (CSH), 2006 WL 510527, at *3 (S.D.N.Y. Mar. 1, 2006).

[8] *See Waterman v. Register.com*, No. 05 CIV 2191 (GEL), 2005 WL 2759825, at *2 (S.D.N.Y. Oct. 19, 2005).

[9] *See Lee v. Healthfirst, Inc.*, No. 04 Civ. 8787 (THK), 2006 WL 177175, at *5 (S.D.N.Y. Jan. 25, 2006).

[10] Pls.' Mem. in Opp. to Mot. to Dismiss by Defs. New York Univ. and Dr. Andrew Litt at 6, *New York Medscan LLC v. Carecore Nat'l LLC*, No. 05 Civ.4653 (DC) (S.D.N.Y. Nov. 18, 2005), 2005 WL 3654139 (quoting *Balaklaw v. Lovell*, 14 F.3d 793, 801 (2d Cir. 1994)).

tentially remote recovery is not subject to dismissal."[11] Numerous other plaintiffs have swiftly incorporated *Twombly* into their filings.[12]

A further, though not statistically rigorous, indication of *Twombly*'s immediate impact can be seen in the number of times courts have already cited the Second Circuit's opinion. During the week it decided *Twombly*, the Second Circuit issued eight published opinions.[13] *Twombly* is the most cited of these opinions by far, having been referenced by courts more than twice as often as the next most frequently cited opinion and five times more often than any of the others.[14]

In short, *Twombly* is far from simply yet another decision that applies existing Rule 8 pleading standards. Rather, it is an important ruling whose evisceration of well-established pleading requirements has already started to expand far beyond its original context and seems certain to continue doing

---

[11] *See id.* at 5 (emphasis added).

[12] *See, e.g.*, Mem. of Law in Opp. to Xerox Defs.' Partial Mot. to Dismiss the Am. Compl. at 26, *Carlson v. Xerox Corp.*, No. 3:00-CV-1621 (D. Conn. Jan. 31, 2006), 2006 WL 372098; Class Pls.' Mem. in Opp. to Defs.' Joint Mot. to Dismiss Claims Alleged to be Outside the Statute of Limitations in Class Pls.' Second Am. Consol. Class Action Compl., *In re Publ'n Paper Antitrust Litig.* at 3-4, No. 3:04 md 1631 (SRU) (D. Conn. Nov. 30, 2005), 2005 WL 3726244. A Westlaw Keycite search performed on April 4, 2006 revealed 59 trial-court filings referencing *Twombly*. Because that database includes only a small fraction of all filings, the true number is certainly far larger.

[13] In addition to *Twombly*, the cases are *United States v. Martin*, 426 F.3d 83 (2d Cir. 2005); *United States v. Santos*, 425 F.3d 86 (2d Cir. 2005); *Nokia Corp. v. Uzan*, 425 F.3d 1005 (2d Cir. 2005); *United States v. Valdez*, 426 F.3d 178 (2d Cir. 2005); *United States v. Broadcast Music, Inc.*, 426 F.3d 91 (2d Cir. 2005); *Zmijewska v. Gonzales*, 426 F.3d 99 (2d Cir. 2005); and *Daniel v. American Board of Emergency Medicine*, 428 F.3d 408 (2d Cir. 2005).

[14] All citation data in this paragraph was obtained through a Westlaw Keycite search conducted on April 4, 2006.

so unless it is promptly disavowed. Because the Second Circuit has refused to do so, *see* Pet. for Cert. App. 59a, this Court's intervention is necessary.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

TIMOTHY J. MURIS
(Counsel of Record)
REBECCA H. FARRINGTON
TOBY HEYTENS
ADAM J. COATES
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

April 6, 2006